

*Judgment of the Lords of the Judicial
Committee of the Privy Council on the Appeal
of Nilcomul Lahiree v. Bhoobunnessuree
Debia (No. 43 of 1869) from the High Court
of Judicature at Fort William, Bengal ;
delivered 23rd March, 1873.*

Present :

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THESE two Appeals were consolidated by the High Court and have been heard together with another Appeal No. 37 of 1869.

The Appeals arose out of three suits Nos. 19, 20 and 27, of 1867, brought in the Court of the Principal Sudder Ameen of Zillah Rungpore, and which three suits were heard together with another No. 9 of 1867, by the Principal Sudder Ameen, and without objection by either party (Record 96) upon the evidence given in all the suits. The main question in this Appeal in suit No. 20 of 1867, in which the Appellant was Plaintiff, was whether the will which he set up was the genuine will of his uncle, the late Shibnath Lahiree ; the question in the appeal in suit No. 19 of 1867, in which the Respondent, the widow of the said Shibnath, was the Plaintiff, was whether the will which she set up as the will of her deceased husband and of which she filed copies with her plaint was the genuine will.

The wills set up by the parties respectively bore the same date, viz., the 9th Joisto, 1268, and purported to be attested by the same witnesses. The

Principal Sudder Ameen, after a full consideration of the tenor of the alleged wills, the probabilities, the circumstances of all the witnesses, and the discrepancies in their evidence, did not believe that either of the wills was genuine and he decreed accordingly. (Record pp. 101, 291.)

Both parties appealed and the High Court, after a careful consideration, came to the conclusion that the will propounded by the nephew in suit No. 20 was a forgery, and that the copies of the will filed with the plaint of the widow in suit No. 19, were true copies of the genuine will of her deceased husband.

Both Courts, therefore, found against the genuineness of the will propounded by the Appellant, and their Lordships have no doubt that the concurrent opinions of the two Courts upon that question of fact were correct.

It is not at all probable that, if the will set up by Nilcomul was genuine he would have abstained from suing the widow immediately after the death of the surviving son for the recovery of the property. The will, if genuine, was one of Nilcomul's muniments of title and belonged to him and it is improbable that he would have allowed it to be filed in Shibsoonderee's suit instead of filing it in a suit by himself against the widow.

There can be no doubt that the will was all along under his control, indeed, it was proved by Kashee Proshand Sen, a witness cited by both parties, that Nilcomul told him that the will filed in the Act, 40 Case, was with one under his influence.

There could have been no feeling of delicacy towards the widow on the part of Nilcomul, which induced him to delay the commencement of a suit against her, for he was openly accusing her of a want of chastity.

Even when he did sue he did not claim title solely as devisee under the will, or set out in his plaint those portions of the will under which he claimed. He said—

“The said property belonged to my uncle (father's brother), the late Sheebnath Lahiree, which, after his death, devolved on his minor sons, Kally Prosono Lahiree and Tarinee Prosono Lahiree. Of the said two minors, Tarinee Prosono Lahiree died in the month of Aughran 1272, and Kally Prosono Lahiree died in the month of Srabun 1273. *As before the death of the first*

mentioned Tarinee Prosono Lahiree, his mother, the Defendant, became unchaste, and as both the minors died without marrying, I am the heir ; consequently, according to the Hindoo Shasters and the terms of the will executed by my uncle (father's brother) on the 9th Joisto, 1268, which was filed by the Defendant, and proved in the Civil Court of this zillah, in the summary suit No. 4 of 1861 for certificate under Act 40 of 1858, the right to those properties has accrued to me."

If the will set up by Nilcomul was genuine, he took the immovable property under it, whether Bhoobunesseree was unchaste or not. He claimed, however, not under the terms of the will as devisee upon the death of the sons unmarried, but as heir to the sons in consequence of their mother's guilt. It is true, he adds, "according to the Hindoo Shasters and the terms of the will filed by the Defendant and proved in the civil Court ;" but still he relied upon his title as heir to the sons in consequence of the widow's want of chastity.

The Principal Sudder Ameen expressed an opinion that a draft will had been prepared, but that Shibnath died before he signed a will. The pleaders of both parties, however, admitted that Shibnath executed a will. Nilcomul Lahiree, the Appellant, in his verified written statement, made in the suit brought against him by the widow, admitted the fact that a will was signed by Shibnath. The witnesses of both parties proved that a will was signed, and there was no dispute that the date of it was the 9th Joisto, 1268, and that it was attested by the persons who, from the copies produced by the widow, purported to be the attesting witnesses.

The theory of the Principal Sudder Ameen appears to their Lordships to be inconsistent with the inferences to be legitimately drawn from the conduct of the parties, and from the undisputed facts of the case. The widow and Nilcomul concurred in the production of a document purporting to be the will of Shibnath, and the certificate of guardianship was granted on the production in Court of such a document. The theory of the Principal Sudder Ameen would lead to the conclusion that the widow and Nilcomul concurred in the production of a false will. It was not absolutely essential to the grant of a certificate that any will should be produced. The widow might have relied upon her title as natural guardian of the minor. Both parties must have agreed upon the terms of

the document produced as the will, and it does not appear probable that the widow would have agreed to allow a false will to be propounded, which contained a passage touching her possible want of chastity and provisions in derogation of the legal rights which might possibly accrue to her as heir in succession in the event of the death of the sons without issue ; on the other hand, it is not probable that Nicomul would have agreed to propound a false will which conferred on the widow a power to adopt. The probability, therefore, is either that the copy produced by one or other of the parties as a copy of the true will of Shibnath, is a copy of the document filed in the Judges' Court, or that a third document, of which there is no trace, was propounded in support of the certificate of guardianship. The latter hypothesis is inadmissible. If the first be admitted, the question, of course, remains : Which of the two copies now in dispute was the document then produced ? Their Lordships have no doubt that Nilcomul, Bisonath Roy, and Gopeenath Bagchy acted in collusion in obtaining, without the knowledge of the widow, the return of the will which was filed on the 3rd July, 1861, in the Judges' Court upon the widow's application for a certificate of guardianship. Bisonath stated in his evidence that Shibnath executed a will in his presence on the 9th Joisto, 1268, the date of the will set up by each of the parties.

Gopeenath Bagchy, who was one of the Defendants in the widow's suit, and a witness for the nephew in his suit No. 20, stated that he was formerly employed by the widow, but that he left her service about three years ago, that is, about August, 1864, and entered the service of Nilcomul. He stated that after the certificate case was decided he took back the will from the Judges' Court through a pleader, Kassee Bose, and that a few days afterwards he returned it to the widow. Kassee Bose, it should be remarked, was the pleader who signed the receipt for the will when it was returned (p. 222), but was not the pleader by whom it was originally filed ; that pleader being Robelochun Shome (p. 160). If Robelochun Shome had been employed to get back the will, the fact of the return would probably have come to the knowledge of the widow ; therefore a different pleader was employed, and the reason given by Gopeenath Bagchy for employing Kassee Bose

was that he takes lower fees than any other pleader. Gopeenath Bagchy further stated that he gave the will into the widow's hand (p. 28), and that at that time Raj Chunder Chuckerbutty and Bhubun Dasse were present (pp. 233, 234). Bhubun Dasse, in her evidence as a witness for Gopeenath in the widow's suit (p. 73), stated, in August 1867 (p. 88), that Gopeenath returned the will about six years ago, which would make it about August 1861, shortly after the application for the certificate. Raj Chunder Chuckerbutty, although examined as a witness upon other matters, said nothing as to the return of the will to the widow. Gopeenath Bagchy, when examined as Nilcomul's witness in the widow's suit, stated that he gave back the will to the widow in the month of Assur or Srabun 1271, which would be about July or August 1864. Bisonath Roy stated in his evidence on behalf of his wife, the Plaintiff, in suit No. 9 (p. 203), that he used to live in the house of the widow, and that she used to keep her documents with him, because she trusted him. He says, "In like manner she kept with me the will in dispute. On account of her bad conduct, I went away from that place, and from that time she has not paid my wife's allowance. As I had some concern in that will, I took it and kept it in my box. Afterwards I gave it to the pleaders engaged in this Cause." (That is his wife's suit No. 9.) On cross-examination, he said the will was kept with me in Bhadro 1271, after the Certificate Case. I do not recollect whether it was in the year 1271 or 1270. I left that house in the month of Assin in that year. Bhoobunnessuree does not know that I took away the will. I gave the other documents to her and went away. Bhoobunnessuree asked me whether I kept all the documents or not. I said all are here; one or two, which are with me, will be given to you afterwards.

It was proved, however, by Shib Chunder Lahiree, a witness cited by both parties, and who, the Principal Sudder Ameen said, was described by both parties as a respectable, trustworthy person, (p. 99) that Bisonath Roy and Shibsoonderee had a difference with the widow, and that, to his knowledge, they left the house in 1270. (See his evidence in the suit for account No. 27 of 1867, p. 46.) This is confirmed beyond all doubt by

the plaint of Shibsoonderee, which Bisonath verified. Bisonath, in his evidence, stated that he could not say whether they left in 1270 or 1271; but he was clear in his statement that, from the time of their leaving the widow's house, the widow had not paid his wife's allowance. Now, the plaint in the Suit No: 9, brought in the name of Shibsoonderee against the widow for her allowance, fixes the date, for, in the particulars annexed to the plaint, the sum of 900 rupees is the amount claimed for three years from the month of Maugh 1270 (about January 1863) to the 30th Pous 1273 (or January 1866).

It seems clear, therefore, that Bisonath and his wife left the widow's house in 1863, whereas the will was not returned from the Court until the 10th May, 1864. The attempt of Bisonath to make it appear that after the will was taken back from the Court in May 1864 it was returned to the widow, and afterwards intrusted by her to him, and that he carried it away with him when he and his wife left the widow's house, wholly fails.

Their Lordships are of opinion that it was taken out of Court after Bisonath left the widow's house, and that it never was returned to the widow. How, then, did Bisonath get it, and from whom?

Kashee Proshand Bose, Pleader, appears to have signed the petition for the return of it, which was presented in the name of Bhoobunnessuree on the 26 Bysack, 1271 (May 1864), and also to have signed the receipt upon its being returned (page 222). The mooktearnamah from the widow to Gopeenath Bagchy is dated as far back as 11 Assar, 1268 (page 262).

Kashee Proshand Bose was employed by Gopeenath Bagchy, who acted probably under the authority of his mooktearnamah after he left the widow's service, and has entered the service of Nilcomul, and also after Bisonath and his wife left the widow's house upon the allegation that she had been guilty of misconduct. It is clear that Gopenauth, Bisonath and Nilcomul were acting in concert, though the suit No. 9 was brought in the name of Shibsoonderee for the arrears of her alleged allowance. Gopeenath Bagchy formerly the family mooktear, and the mooktear who had acted for the widow after her husband's death, but who left her service upon the

alleged ground that she had become unchaste and entered into the service of Nilcomul (page 234), managed the suit brought in the name of Shibsoonderee against the widow and also against his own client Nilcomul as a co-Defendant. It was admitted by the pleaders that Shibsoonderee and her husband were at that time living in the house of Nilcomul; and, what was most extraordinary if the suit was a real one, it was proved that Nilcomul himself was managing that suit, in which he was a co-Defendant. Gopeenath Bagchy in his evidence, in the suit No. 9, says: "Nilcomul Lahiree and myself manage the suit." Now it is a most remarkable fact that when the document, which purported to be the will of Shibnath, and to have been filed in and taken back from the Judge's Court, was filed with the plaint in Shibsoonderee's case, a request was made that extra caution should be taken to guard against its loss; and what is still more extraordinary, stamped papers were filed on the very same day in order to obtain a copy of the alleged will from the record of the case No. 9, and, on the following day, the 2nd February, 1867 (page 160), a copy of it was, with a degree of expedition almost unparalleled in the Mofussil Courts, prepared and delivered out to the applicant. The copy, it appears, was made and delivered out in a single day, whereas it took more than a month to obtain a copy of the short petition presented in the name of the widow, which contained only a few lines, asking for a return of the will from the Record of the Certificate Case (p 222).

The copy of the document so obtained from the Record in Shibsoonderee's Case No. 9 is the copy which was filed by Nilcomul in suit No. 20, and their Lordships have no hesitation in rejecting it as a copy of the true will of Shibnath.

The circumstances of the abstraction of the original document, and the suspicion which attaches to Nilcomul of having been the party principally concerned in that fraudulent transaction materially affect the credit of the witnesses from the Judges' Court who were examined as to the indorsements on the document. Of that testimony it is further to be observed that, however plausible it may be, it has been discredited by both Courts, and their Lordships do not believe it.

The next question to be considered is, whether

there is sufficient evidence that the copies produced by the widow are true copies of the will of Shibnath and of the document produced in July 1861.

Kallymohun Chuckerbutty, in his deposition p. 45, stated that he knew that Shibnath made a will containing permission to adopt; that he saw it executed; that Nilcomul had the management of the case for obtaining a certificate under Act 40; that he took the will from the widow in order to file it in the said case; that witness, by the order of Nilcomul, made a copy of it and gave the original as well as the copy to him. He identified the copy (A) filed by the widow as being in his handwriting. He also stated that after the death of Kaleprosonno, that is, the surviving son of the widow, Nilcomul told him that he wanted to give his youngest son to the widow for adoption and to have the management of the property, and that on his telling this to the widow, she said she was willing to make the adoption, but that she would not make over the management of the property to Nilcomul. Petumber Chuckerbutty gave evidence similar in effect (page 46).

The Principal Sudder Ameen, however, discredited the evidence of those two witnesses, p. 99, par. 6. He also discredited Ram Mohun Chuckerbutty, who stated that Shibnath told them that he had made a will to the effect that, if his son should die in two or four years his wife should adopt a son; his reason for disbelieving the witness was that there was no mention in the will about adoption in the event of the death of a son within two or four years. That reason appears to their Lordships to be wholly insufficient. The will set up by the widow gave power to adopt if the sons should die unmarried. The Principal Sudder Ameen, however, took the words "within two or four years" in their strict literal sense, and not in the sense in which such words are used by native witnesses, and thereupon stigmatized the witness as a false witness. It is unnecessary to say whether that witness, or that particular statement, was to be believed or not. Their Lordships allude to the reason simply to point out the slight grounds upon which the witness was discredited by the Principal Sudder Ameen; many other witnesses also seem to have been discredited for reasons equally unsatisfactory.

The Principal Sudder Ameen appears to have given credit to Robeelochn Shome : he says, "By hearing the evidence of Moonshee Robeelochn Shome, &c., I think the draft of a will was made." Now, Robeelochn Shome says, "I saw the draft of a will before the death of Shibnath. It contained permission to adopt. Gopeenath Bagchy showed me a will signed in the name of Shibnath, which also contained permission to adopt. I drafted the petition for the Act 40 case referring to the will. I gave it to Gopeenath together with the will. He gave me in the Court a petition engrossed on stamp paper, together with the will and vakalutnamah. I, after signing them, duly filed them in Court. I did not read it at that time, Niloo Baboo managed that suit. I do not recollect having afterwards read the will. Niloo Baboo said to me that the will was in his power."

Looking at all the evidence and the circumstances of the case their Lordships are of opinion that Shibnath signed a will and that it contained a power to adopt; that that will was entrusted by the widow to Nilcomul in order to obtain a certificate of guardianship; that the document filed in the suit brought in in the name of Shibsoon-deree, and of which Nilcomul obtained the copy which he filed in his suit, was not the document which was entrusted by the widow to Nilcomul, and that that document has either been destroyed, or is under the control of Nilcomul. It has not been produced, and their Lordships are of opinion that the copies produced by the widow are true copies of the real will of Shibnath. Under these circumstances they will humbly advise Her Majesty that, in each of these Appeals, the decree of the High Court be affirmed with costs.

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