A

SETH BENI CHAND (SINCE DEAD) NOW BY L.RS.

v.

SMT. KAMLA KUNWAR AND OTHERS

September 14, 1976

B [Y. V. CHANDRACHUD, V. R. KRISHNA IYER AND N. L. UNTWALIA, JJ.]

Indian Succession Act, 1975, S. 63(c), Attesting witness defined.

Indian Evidence Act, S. 68—Discharge of onus probandi by propounder when execution of will surrounded by suspicious circumstances.

C Three or four days before her death, Jaggo Bai executed a will, bequeathing her Stridhana property to her son Beni Chand's second wife Kamla Kunwar and her children, and also to the progeny born of his first wife. Beni Chand, his third wife and her children were excluded from the will. Beni Chand opposed the probate of the will contending that it was a forgery and challenged the execution of the will. A single Judge of the High Court held that the propounder of the will had failed to explain the suspicious circumstances surrounding its execution, but in appeal, the Division Bench upheld the validity of the will.

D Dismissing the appeal, the Court

HELD : (1) The mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence showing due execution of the document. An attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document. [581H, 582A]

E (2) The *onus probandi* 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 free and capable testator. Where the circumstances surrounding the execution of the will are shrouded in suspicion, it is the duty and function of the propounder to remove that suspicion by leading satisfactory evidence, and by offering an explanation of auspicious circumstances which can satisfy a prudent mind. [582C, E-F]

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2269 of 1972.

(From the Judgment and Order dated 9-5-1972 of the Allahabad High Court in Special Appeal No. 125/70).

J. P. Goyal, G. S. Chatterjee and *Shree Pal Singh,* for the Appellants (Other than 2nd appellant).

G *S. M. Jain* and *S. K. Jain,* for the Appellant No. 2.

V. M. Tarkunde, Yatindra Singh, Deepal Gupta, Najahad Hussain, S. S. Khanduja, Uma Dutta and *Miss Manik Tarkunde,* for Respondents Nos. 1, 4, 5, 7 and 8.

S. K. Mehta, for Respondents Nos. 11--12.

H The Judgment of the Court was delivered by

CHANDRACHUD, J.—This appeal by certificate raises a question as regards the validity of a will executed by an eighty year old woman

five days before her death. The testatrix Jaggo Bai had a much-married son called Beni Chand, the last of whose three marriages has given birth to this long litigation. Beni Chand's first wife, Chameli Bai, died leaving behind Respondents 3, 5, 6, 7 and 8 as her heirs. His second wife Kamla Kunwar is Respondent 1. Respondent 4 is her daughter and respondents 9 and 10 are her grand-daughters. Beni Chand had no male issue from his two wives and therefore, in 1928, he gambled for a son by marrying Ved Kumari. That marriage created dissensions in the family, partly because Ved Kumari belonged to a different caste but more substantially because the entry of yet another woman in the household was like a last straw. On October 26, 1961 Jaggo Bai made a will disinheriting her son Beni Chand and the children born of Ved Kumari, and bequeathing her extensive properties to the progeny born of Chameli Bai and to Kamla Kunwar and her progeny. Jaggo Bai died on October 31, 1961.

Kamla Kunwar who was appointed under Jaggo Bai's will as an executrix filed a petition in the Allahabad High Court for probate of the will. Beni Chand filed a caveat contending that the will was a forgery and was prepared in collusion with one Dwijendra Nigam, an advocate, while Jaggo Bai was lying in an unconscious state. A learned single Judge of the High Court dismissed the petition on the ground that the propounder of the will had failed to explain the suspicious circumstances surrounding the execution of the will. That judgment was reversed in appeal by a Division Bench of the High Court, which upheld the validity of the will. This appeal by certificate is directed against the appellate judgment of the High Court.

There is no gainsaying the fact that the execution of the will is shrouded in circumstances which require a cogent explanation, particularly as the testatrix was advanced in age and the provisions of the will are *prima facie* unnatural. But, we do not see enough reason for rejecting the conclusion of the High Court that the executrix who propounded the will has offered a satisfactory explanation of those circumstances. The relations between Jaggo Bai and her son Beni Chand were strained beyond words. A long span of over 30 years following upon Beni Chand's marriage with Ved Kumari is littered with a spate of litigations between the mother and son. Beni Chand gave to his mother a good look of law and law courts, civil and criminal. Exasperated by his unfilial contumacy, Jaggo Bai executed a gift deed of her Stridhan properties excluding him scrupulously from her bounty. Later, she executed a document of a testamentary nature disinheriting him. These instruments were on persuasion cancelled but Beni Chand did not mend his ways. On October 26, 1961 when the impugned will was executed by Jaggo Bai, a litigation was still pending between the mother and son, and just 3 or 4 days before the execution of the will, the eighty-year old Jaggo Bai had to appear in the Court. In this background, the fact that Jaggo Bai did not give any part of her properties to Beni Chand cannot be described as unnatural. Add to that the stark fact that the testatrix while disinheriting Beni Chand, bequeated the entire property to his wife, Kamla Kunwar, the children born of her and to the progeny born of Beni Chand's first wife Chameli Bai. Jaggo Bai.

A never reconciled herself to Beni Chand's third marriage with Ved Kumari and she excluded that branch from the bequest.

It is alleged that Dwijendra Nigam, an advocate, conspired with Jaggo Bai's pre-deceased daughters's son Ratan Lal to forge the will. But from the long and varied cross-examination of Nigam it is difficult to discover any reason why he should do so. He received no benefit B under the will and had no interest either in seeing that the progeny born of Beni Chand's first two wives should get the property or in ensuring that Beni Chand, Ved Kumari and their children should be left out. It is significant that Beni Chand who alleged by his caveat that Nigam was the villain of the piece, did not file any affidavit in support of his caveat and what is more important, he did not enter the witness-box to substantiate his accusation. The charge that Nigam C and Ratan Lal forged the will is thus left to chance and guess-work. As for Ratan Lal, who is respondent 2 to this appeal, he admitted the execution of the will though it was against his interest to do so. If the will is set aside, Beni Chand and Ratan Lal will each be entitled on intestacy to a moiety in Jaggo Bai's estate, which was her Stridhana property. Ratan Lal gets nothing under the will of his grand-mother Jaggo Bai.

D These features of the case dispel the suspicion arising out of the circumstances that the testatrix was at the threshold of death when she made the will, that she was far too advanced in age to bring to bear an independent judgment on the disposal of her property and that she disinherited her only son under her will. It has to be mentioned that though over eighty years of age, Jaggo Bai was not an invalid, that just E a few days before her death she had appeared in the court in a case relating to Zamindari Bonds between her and Beni Chand, that a criminal case launched by Beni Chand against her was defended by her Zealously leading to an order of composition two or three months before her death and that in spite of the unkind cuts that Beni Chand had inflicted on her she wanted to try and help him at one stage. In an old letter (Ex. 161-Ga) which she wrote to him, she said plaintively: F "Now I have a short span of life. I shall not be coming to see what happens hereafter. Please do not injure my heart. Come back at once....". These entreaties fell on deaf ears. Beni Chand dragged his mother from pillar to post over a course of twenty years and he never came back. He lived separately from her and did not bother to attend to her even when she was dying. He awoke to his son-ship only when it came to claiming the mother's estate.

G Two circumstances would appear to have influenced the judgment of the learned Single Judge in holding that the will was not proved to be last will and testament of Jaggo Bai. The first circumstance is that the thumb-mark which Jaggo Bai is alleged to have made on the will does not bear the usual endorsement that it is of the left or the right thumb and secondly that neither of the two attesting witnesses H was examined to prove the formal execution of the will.

The Division Bench of the High Court, sitting in appeal against the judgment of the learned Single Judge. has accepted the explanation

offered by Shri Nigam that the endorsement remained to be made through inadvertence. Nigam had no personal interest in the matter and the explanation, being unmotivated, could reasonably be accepted. The learned Judges also accepted the evidence of the Advocate that he himself held the right hand of Jaggo Bai and took the impression of that thumb on the will. That meets the argument that an impression admitted to be of Jaggo Bai's left thumb does not tally with the one on the will. The two will not tally since the two thumbs would have different characteristics. The will was executed in triplicate, one copy of which was deposited with the District Registrar on October 28, 1961, that is, two days after the will was executed. It is difficult to believe that a practising advocate would run the risk of depositing a forged will with a public official while the testatrix was still alive. Beni Chand lived in the same town as his mother, though separately from her, and it is impossible in the very nature of things that as alleged by him, Nigam and Ratan Lal took the thumb impression of Jaggo Bai while she was lying unconscious. Jaggo Bai might lose her consciousness but she was possessed of a large estate and in the normal course of human affairs, she would, while unconscious, be surrounded by a large number of close relatives of which there were many in the town of Banda in which she lived. To think that Nigam could steal a thumb-impression of the dying woman puts a strain on one's credulity, particularly when he stood to gain nothing and Ratan Lal, the alleged co-conspirator, would be better off without the will. It is a strange plea that Ratan Lal who, on intestacy, stood to gain a one-half share in his grand-mother's estate chose to exclude himself by fabricating the will. There is some evidence that a portion of Jaggo Bai's right thumb was mutilated but on examination of the relevant circumstances in that behalf, the Division Bench of the High Court has rejected the suggestion that the right thumb of the testatrix was so badly damaged as to be incapable of producing an impression. With these plain findings of fact, we see no reason for interfering by going into minute details of the evidence.

There is no substance in the grievance that the proof of the will in this case is incomplete for want of an attesting witness's evidence. Section 68 of the Evidence Act deals with proof of the execution of documents required by law to be attested. It provides that such documents shall not be used as evidence until at least one attesting witness has been called to prove the execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since by section 63 of the Succession Act, 1975 a will has to be attested by two or more witnesses, section 68 of the Evidence Act would come into play and therefore it was incumbent on the propounder of the will to examine an attesting witness to prove due execution of the will. But this argument overlooks that Dwijendra Nigam is himself one of the three persons who made their signatures below the thumb impression of Jaggo Bai. None of the three is described in the will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence showing due execution of the document. By attestation is

A meant the signing of a document to signify that the attestor is a witness to the execution of the document; and by section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document. Nigam's evidence shows that he and the other two witnesses saw the testatrix putting her B thumb-mark on the will by way of execution and that they all signed the will in token of attestation in the presence of the testatrix, after she had affixed her thumb-mark on the will.

The question which now arises for consideration, on which the Letters Patent Court differed from the learned Single Judge of the High Court, is whether the execution of the will by Jaggo Bai is proved satisfactorily. It is well-settled that the *onus probandi* lies in every C 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 free and capable testator.(1) By "free and capable testator" is generally meant that the testator at the time when he made the will had a sound and disposing state of mind and memory. Ordinarily, the burden of proving the due execution of the will is discharged if D the propounder leads evidence to show that the will bears the signature or mark of the testator and that the will is duly attested. For proving attestation, the best evidence would naturally be of an attesting witness and indeed the will cannot be used as evidence unless at least one attesting witness, depending on availability, has been called for proving its execution as required by section 68 of the Evidence Act. But where, as in the instant case, the circumstances surrounding E the execution of the will are shrouded in suspicion, it is the duty and the function of the propounder to remove that suspicion by leading satisfactory evidence. The testatrix was advanced in age being past eighty years of age, the will contains provisions which are *prima facie* unnatural since the only son is disinherited under it and the testatrix died five days after making the will. There can be no dispute that these are gravely suspicious circumstances. But the propounder has, F in our opinion, offered an explanation of these circumstances which ought to satisfy a prudent mind. Ultimately, that is the test to adopt for one cannot insist on mathematical proof even where the circumstances attendant on the execution of the will raise a suspicion as regards its due execution. The burden in testamentary cases is of a different order than in other cases in the sense that an attesting witness must be called, wherever possible, to prove execution, the propounder G must remove the suspicion, if any, attaching to the execution of the will and if there be any doubt regarding the due execution, he must satisfy the conscience of the court that the testator had a sound and disposing state of mind and memory when he made the will. "Reasonable scepticism, not an obdurate persistence in disbelief nor a resolute and impenetrable incredulity" is demanded of the testamentary judge : "He is never required to close his mind to the truth".(2) Gajendra- H gadkar J. who spoke for the Court in *Iyengar's* case(3) noticed these

(1) See Jarman on Wills (6th Ed., p. 50) and *H. Venkatachala Iyengar* v. *B. N. Thimmajamma & Ors.* [1959] Supp. 1 S.C.R. 426.
(2) See *Harmes* v. *Hinkson* (1946) 50 O.W.N. 895 per Lord Du Parcq.
(3) [1959] Supp. 2 S.C.R. 426, 446.

observations of Lord Du Parcq with approval and said : It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect." A

Bearing these principles in mind and giving equal weightage to openness and vigilance, the position emerging from the evidence may be briefly summed up thus : Beni Chand's behaviour was far too unfilial and remorseless for him to find a place in the affections of his mother Jaggo Bai. He had bruised her so badly that she could not possibly reward him with a precious inheritance. But she gave her estate not to strangers but to his children born of the first two wives and to the second wife Kamla Kunwar. She also gave him a personal right of residence in one of the houses. Shri Nigam, the advocate, had no personal motive or bias to hatch a conspiracy to forge the will. He received no benefit under the will, directly or indirectly. And Ratan Lal was the least suitable co-conspirator because, he stood to lose under the will what he would have got without it. He would have been an equal sharer with Beni Chand in Jaggo Bai's estate under section 15(1)(a)) of the Hindu Succession Act, 1956. The entire property comprised in the will was Jaggo Bai's Stridhana. The will was read out to Jaggo Bai and in spite of her advanced years she was in a sound state of mind and body. The chosen few do possess that privilege. Thus the executrix has successfully discharged what, in the circumstances, was a heavy onus of proving the due execution of the will and of offering a satisfactory explanation of the suspicious circumstances surrounding the will. We are in agreement with the Division Bench of the High Court, which was conscious of the special rules governing proof of testamentary instruments, that the will propounded by the executrix is the last will and testament of Jaggo Bai, made while she was in a sound and disposing state of mind and memory. B C D E

Beni Chand who opposed the grant of probate to his wife Kamla Kunwar died during the pendency of the appeal in this Court. He is now represented by his legal representatives almost all of whom supported the grant of probate. The one person from amongst the heirs of Beni Chand who stoutly pressed this appeal is Vikram Chander, one of the sons of Beni Chand, born of his third wife Ved Kumari. F

While Kamla Kunwar's appeal was pending before the Division Bench of the High Court, Beni Chand alienated some of the properties included in the will to a person called Sadhu Prasad. The alienation was purportedly made on the basis that the learned Single Judge of the High Court had set aside the will and had refused to grant the probate to the executrix. The alienee Sadhu Prasad is also an appellant before us, having joined Beni Chand in filing the appeal. We have had the benefit of the arguments advanced by Mr. Jain on behalf of the alienee but nothing that he has urged is enough to upset the view taken by the Division Bench of the High Court. G

The only argument advanced by Mr. Jain to which reference need be made is that even alienees are entitled to citations in probate proceedings and in the absence of such citations the grant of probate is H

A vitiated. In support of this submission reliance is placed on a judgment of the Madhya Pradesh High Court in *Banwarilal Shriniwas* v. *Kumari Kusum Bai and Ors.*(1) It was held in that case that any interest, however slight, and even the bare possibility of an interest is sufficient to entitle a party to oppose the grant of probate. A purchaser, therefore, who acquires an interest in the estate of the testator by reason of a transfer by his heirs must be cited in testamentary proceedings. We B will assume without affirming that this is the true position in law but the important distinction is that the alienee in the instant case is a transferee *pendeme lite* who purchased some of the properties included in Jaggo Bai's will while the Letters Patent Appeal was pending in the Allahabad High Court. In the very nature of things no citation could be issued to him prior to the commencement of the probate proceedings. In fact, we felt that the alienee had no right to be heard in this C appeal. Nevertheless, we heard his counsel on the point whether the executrix has established the will. One reason why we heard the alienee is that he should not be able to raise any objection later that the decision in these proceedings is for some reason or the other not binding upon him.

The property included in the will is for the time being in the possesD sion of a Receiver appointed by the Court. Since we have upheld the will, the Receiver shall have to hand over the property to the executrix, Kamla Kunwar, who is respondent 1 to this appeal. We however direct that the Receiver shall continue in possession of the property for a period of 4 months from today and hand it over to respondent 1 on the expiry of that period. The alienee Sadhu Prasad may, if so advised, file a suit within that period for such relief as he is advised to seek and E obtain interim orders, if he may, within that period as regards the possession of the property alienated to him. Subject to such orders, if any, the Receiver shall hand over the property to respondent 1, Kamla Kunwar.

Mr. Tarkunde who appears on behalf of respondents 1, 4, 5, 7 and 8 made a statement before us on the conclusion of the arguments in F the appeal that even if we uphold the validity of the will, his clients would be willing to make an ex-gratia payment to 4 out of the 5 children born to Beni Chand from Ved Kumari. Two daughters, Subhashni Seth and Chander Rekha and three sons, Pratap Chander, Vikram Chander and Khem Chander were born to Beni Chand from Ved Kumari. Mr. Tarkunde has given an undertaking to this Court on behalf of his clients that they shall pay a sum of Rs. 20,000/- to G each of the two daughters, Subhashni Seth and Chander Rekha and a similar amount to each of the two sons, Pratap Chander and Khem Chander. Under this arrangement, no amount whatsoever shall be payable to Vikram Chander and not certainly to the alienee Sadhu Prasad. According to the undertaking, the aforesaid amount totalling Rs. 80,000/- shall be paid to the four persons mentioned above within one year of the date on which respondent 1 obtains actual possession of H the properties included in the will, which were alienated by Beni Chand. Mr. Tarkunde also agrees and undertakes on behalf of his

1) A.I.R. 1973 M.P. 69.

clients that in the event that the aforesaid amount or any part of it is not paid as stipulated, the persons to whom the amount is payable, or any one or more of them, shall be entitled to recover it in execution of this judgment as if there were a decree in favour of each of them in the sum of Rs. 20,000/-. A

In the result, we dismiss the appeal and direct that the costs of the appeal shall be paid equally by Vikram Chander, the son of Beni Chand and by the alienee Sadhu Prasad. B

M. R. *Appeal dismissed.*