

(1930) 07 CAL CK 0031

Calcutta High Court

Case No: None

Nabagopal Sarkar Bahadur

APPELLANT

Vs

Mrs. Sarala Bala Mitter

RESPONDENT

Date of Decision: July 3, 1930**Citation:** AIR 1933 Cal 574**Hon'ble Judges:** Mukerji, J; Mitter, J**Bench:** Full Bench

Judgement

Mukerji, J.

This appeal has been preferred from the decision of the Additional District Judge, 24-Parganas, granting probate of the will of one Mrs. Bipin Bala Sarkar. She is alleged to have executed a will on 5th July 1922 and got it registered on 17th September 1923. She died on 6th March 1925. Mrs. Sarala Bala Mitter, the executrix named in the will and to whom the entire bequest was made, applied for probate. Notices were issued on the testatrix's husband Rai Bahadur Nobo Gopal Sircar, her brother Dr. S.K. Bose, and her sister Mrs Kiran Bala Chaudhury. The husband and the sister contested the proceedings, and in this appeal the former alone is the appellant. To deal with the questions which have arisen in this appeal a short history of the life of the testatrix will not be out of place. (After giving a long detailed account of her life and describing as to how she came in contact and lived with the executrix, the judgment proceeded). As regards the execution and attestation of the will there is hardly any dispute. It is a registered will of which the whole of the contents were written by the testatrix with her own hand and its execution was admitted by her before the Registrar. The two attesting witnesses Dr. Bejoy Krishna Chaudhury and Mrs. Suniti Laura Ghose have given evidence. In our opinion execution and attestation have been duly proved, and indeed they have not been challenged on behalf of the appellants.

2. It has then been argued that the testatrix since her bereavements and in consequence of her illness was not in a fit state of mind to understand what she was

doing, that she was wanting in rationality and that she was not intelligent enough or had no sufficient mental capacity to grasp the contents of the will. (After discussing the evidence, His Lordship proceeded). To sum up then there was in her a defect, a weakness of the mind; but however much it may be regarded as a disorder of the mind it was in no sense an intellectual disorder and in no degree reflected on her intellectual capacities. To be such mental weakness as would be sufficient to constitute testamentary incapacity, such incapacity, it is well settled, must be qua the will in question. Mrs. Mitter was the only lady who from 1913 or a short time before down to the date of the will was regularly looking after her, taking proper care of her, keeping her company in plains as well as in the hills and providing for her diversions; and it is only natural that all her feelings, her affections and her wishes would be centred round her; so the will was not at all an unlikely production. The will is a very short document which a lady of the calibre of the testatrix who had some little education in her childhood, had travelled to England, and had borne the company of Anglo-Indian ladies for a series of years and had lived with Mrs. Mitter for nearly 10 years or so would find no difficulty in comprehending. In these circumstances it must be held that the appellants' contention in this respect fails. (After rejecting the argument regarding the date of the execution of the will, the judgment proceeded). It has been contended in the next place on behalf of the appellant that the will was the result of undue influence exercised by Mrs. Mitter on the mind of the testatrix. Leaving the question of fraud apart as distinct from undue influence the matter stands thus: From 1910 or at all events from 1912 or 1913, Mrs. Mitter exercised considerable and weighty influence over the mind of the testatrix. This influence no doubt, in so far as it was beneficial, was duly recognised by the husband; she made her happy while she was miserable before. It may also be that Mrs. Mitter to a certain extent dominated the will of the testatrix and had latterly, as the letters referred to above in detail suggest, succeeded in having ascendancy over her mind in such a way that the testatrix regarded her counsel as supreme.

3. It is also not an unreasonable inference to make from the said letters that Mrs. Mitter, although she in the beginning had been acting with the best of motives, latterly conceived the idea of getting from Mrs. Sarkar little by little all that her husband had in order that ultimately all that would come to her under the will. It is also not unlikely that in her offer to provide for a house of her own for Mrs. Sarkar Mrs. Mitter was really arranging to have her own house made, as the change of mind from time to time on the part of Mrs. Sarkar as disclosed by the letters suggest. Certain statements in Mrs. Sarkar's letters, the truth of which has been denied by Mrs. Mitter but which it is impossible to regard as really untruth proceeding from Mrs. Sarkar, clearly demonstrate that Mrs. Mitter was making false representations to her to serve her own purposes in the matter of raising loans for the erection of the houses and so on. But then all this would not amount, in law, to such undue influence as would be sufficient to vitiate a will: see *Wingrove v. Wingrove* (1886) 11 P D 81 *Bandains v. Richardson* (1906) A C 169 and *Craig v.*

Lamourex (1920) A. C. 349. Mrs. Mitter may have acquired an ascendancy over the will of the testatrix but the testatrix was a person of competent understanding and in doing what she did the testatrix could not have said: "This is not my wish but I must do it." The will however brought about either by good offices truly rendered to the testatrix or by show of false affection or concern for the good and welfare of the testatrix or by using the testatrix as a means for securing a purely selfish end, must, in our judgment, be regarded as the expression of the testatrix's own wishes. We reject with confidence the evidence that has been adduced to show that the testatrix was ever ill treated or unkindly treated by Mrs. Mitter or that the testatrix had during her last illness spoken to her husband about the will having been extorted from her.

4. There remains then the case of fraud to be considered, (After discussing the evidence regarding this, the judgment proceeded.) It is clear therefore that her health at the time when she executed the will as well as when she had it registered was far from satisfactory, and the mental and physical weakness that she must have been suffering from at the periods concerned may also have contributed to a readiness in believing in the picture as to her pecuniary indebtedness that was falsely presented before her by Mrs. Mitter. Key, L.J., observed in the case of *Hampson v. Guy* (1891) 64 LT 778:

The amount of evidence which would induce a person of strong mind and in good health to make a will according to the wishes of the persons who were inducing such a testator must be very much greater than the amount of inducement which would improperly influence the mind of a person who was weak partly from mental infirmity and partly from ill-health.

5. It is true that there was no question of fraud in that case, but it cannot be said in the case of inducement by fraudulent misrepresentation the position is anything different. We are of opinion that it was by means of fraudulent misrepresentation which vitally affected the judgment of the testatrix that the will was procured. We accordingly allow the appeal and reversing the decision appealed from order that the application for probate be dismissed with costs in both the Courts.

Mitter, J.

6. I have come to the same conclusion as my learned brother; and I would add nothing were we not differing from the Judge of the Court below on a question of fact where he had seen and heard the witnesses. I have no doubt that the will of which probate has been applied for was executed by the testatrix Mrs. Bepinbala Sarkar on 5th July 1922 with full knowledge of its contents and that she got it subsequently registered. The propounder of the will has proved affirmatively that the testatrix knew and approved of the contents of the will. There is much force in the contention of the learned Advocate-General that on this part of the case the appellant's arguments as to her testamentary incapacity are based on suspicions

and suggestions and not on evidence. The evidence leads me to think that the testatrix was an intelligent lady, but at the same time impressionable, for Bimalabala, witness 13 for the defendant, tells us that she was a resolute lady in the sense that, being influenced by her friends, she did many things irrespective of consequences. The onus is therefore thrown on the caveator, now appellant, to prove either fraud or undue influence in obtaining the will: see *Tyrrell v. Painton* (1894) PD 151.

7. The will, to my mind, is however an inofficious will and ignores the claims of the husband to the bounty of his wife in respect of property which she alleges she obtained by gift from him and the bequest is made solely in favour of the propounder with whom the testatrix was in terms of the greatest intimacy for a very long time. The circumstances under which this intimacy grew up have been detailed with great minuteness in the judgment of my learned brother and I do not propose to recapitulate them. The will may not be an unnatural one in the circumstances, but one is tempted to enquire what are the overriding considerations which made the testatrix disregard the claims of her husband to her bounty. The real matter for consideration is whether it has been established that the will has been obtained by fraud or undue influence. (After examining the evidence, His Lordship proceeded.) Indeed it is impossible to escape the conclusion that it was under this impression that the testatrix thought it her duty to make the will and thus to repay the debt of the respondent which however did not exist in reality. Her evidence makes it clear that it was she who induced this belief on a mind which was easily subject to the importunities and influences of friends. The testatrix was a person of sufficient capacity. The propounder described her nature in one of the letters as not really normal. She was a spellbound lady and was so much led by others that she had nothing to call her name. The false belief was induced in her by one who, if she did not dominate the will of the testatrix, was in a position of active confidence with her and where a will is made in favour of such a person it is duty of the Court to scan the evidence of independent volition closely in order to be sure that there had been a thorough understanding of the consequences by her. This deceit practised on a mind easily led away by impressions is sufficient to annul her testament.

8. The Judge below thought that it was not within the scope of the present suit to see whether the loan of Rs. 15,000 was partly or wholly unfounded. He missed its bearing on the question as to what induced the testatrix to make the will. Fraud is no less detestable in law than open force. Where therefore as in the present case the testatrix is circumvented by fraud the testament is of no more force than if she were constrained by fear. It may be taken to be fairly established that although the testatrix did know and approve of the contents of the will the paper may be refused probate if it be found that fraud has been purposely practised on the testatrix in obtaining the execution thereof: *Guardhouse v. Blackburn* (1866) 1 P 109 not disapproved in *Fulton v. Andrew* (1875) 7 HL 448. It is difficult to define the different grades or shades of fraud. But here, for the reasons given, I am clearly of opinion

that the will was the result of the deception practised on her by the false representation that Rs. 15,000 was due from the propounder of the will to the testatrix, a representation which on the evidence appears to be wholly devoid of truth. It remains to notice an argument regarding undue influence put forward by the appellant. It is not enough to show, as the appellant contends, that the testatrix's will was dominated by the propounder but it must be shown further that the influence was exercised on the particular occasion and the will was the result of that influence: see *Wingrove v. Wingrove* (1886) 11 P D 81 *Bandains v. Richardson* (1906) A C 169 and *Craig v. Lamoureux* (1920) A C 349. We have no evidence in this case of undue influence in the sense that she was coerced to make the will. But I have already stated that the will was the result of the false representation that a large debt was owing by the testatrix to Mrs. Mitter and cannot stand. It remains to notice another argument of the learned Advocate-General that this ground of fraud is not indicated in the objection of the defendant and reference is made to para. 14 of the objection, p. 27, where misrepresentations of a different kind are alluded to. But I think in paras. 19 to 21 of the objections the fraud based on misrepresentation in Ex. P is raised. In para. 21 it is distinctly stated that the statements in the Bengali writing were not true and correct and the caveator believed that "it was procured and induced by the fraud of the proponent" (referring to Ex. P).