Supreme Court of India
Durga Prasad vs Devi Charan on 19 September, 1978
Equivalent citations: 1979 AIR 145, 1979 SCR (1) 873
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
DURGA PRASAD

Vs.

RESPONDENT:
DEVI CHARAN

DATE OF JUDGMENT19/09/1978

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
SHINGAL, P.N.

CITATION:
1979 AIR 145 1979 SCR (1) 873
1979 SCC (1) 61

ACT:
Indian Succession Act, 1925 (39 of 1925)-Will not found on death of testator-If presumption as to revocation arises-Onus alleging revocation on whom lies.

HEADNOTE:
The respondent was the adopted son of the testatrix who made a will in 1935 declaring that her properties were dedicated to a private temple of hers in her house and would remain so for all times to come. In 1938, however, she revoked the earlier will and dedicated a part of the house and certain other items for the benefit of the temple. But she expressly prohibited the respondent from performing her funeral rites and gave certain rights over the property to the appellant and his wife. In 1947 she again revoked the will made in 1938 and bequeathed her properties to the appellant without right of alienation and had also clearly stated that the respondent should have no concern with her estate and should not be allowed to touch her dead body.

On her death, though the original will was not found, a draft will which was almost of the same time was discovered. The recitals in the draft were almost the same as in the will of 1947.

In the appellant's petition before the District Judge

for grant of letters of administration or probate the respondent contended that the testatrix was not of sound disposing mind at the time of the alleged execution of the will and that the appellant had exercised undue influence over her in the execution of the will. It was further alleged that the will was subsequently revoked and that was the reason why it was not found in the house despite search.

The District Judge accepted the respondent's version and rejected the petition for probate. On appeal a single Judge of the High Court found that the will was genuine and had not been revoked. On further appeal the Division Bench restored the order of the District Judge dismissing the appellant's application for probate by drawing a presumption that the testatrix had revoked the will by destroying it before her death.

In appeal to this Court it was contended on behalf of the appellant that the High Court was in error in drawing a presumption of revocation of the will in view of the express provisions of s. 70 of the Indian Succession Act, 1925 and in the alternative even if the presumption was available to the respondent the same being a rebuttable one. was sufficiently rebutted by facts and circumstances proved in the case.

Allowing the appeal,

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HELD: The presumption that the will was revoked by the testatrix had been sufficiently rebutted and the respondent had failed to discharge the onus which lay on him to prove that the will was revoked. The will being a product of free will of the testatrix there must be strong and cogent reasons for holding that it was revoked. The fact that the will was not found, despite search, was not
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sufficient to justify a presumption that the will was revoked. Having regard to the fact that the respondent was interested in destroying the will and had access to the house, the presumption would be that the will was either stolen or misplaced by him or at his instance. [890C-E]

The correct legal position may be stated thus:

(i) Where a will has been properly executed and registered by the testator but not found at the time of death the question whether the presumption that the testator had revoked the will can be drawn or not will depend on the facts and circumstances of each case. Even if such a presumption is drawn it is rather a weak one in view of the habits and conditions of our people.

(ii) Such a presumption is a rebuttable one and can be rebutted by the slightest possible evidence, direct or circumstantial. For instance, where it is proved that a will was a strong and clear disposition evincing the categorical intention of the testator and there was nothing to indicate the presence of any circumstance which is likely to bring about a change in the intention of the testator so as to

revoke the will suddenly, the presumption is rebutted.

(iii) In view of the fact that in our country most of the people are not highly educated and do not in every case take the care of depositing the will in the bank or with the Solicitors or otherwise take very great care of the will as a result of which the possibility of the will being stolen, lost or surreptitiously removed by interested persons cannot be excluded, the presumption should be applied carefully.

(iv) Where the legatee is able to prove the circumstances from which it can be inferred that there could be absolutely no reason whatsoever for revoking the will or that the Act of revoking the will was against the temperament and inclination of the testator, no presumption of revocation of the will can be drawn.

(v) In view of the express provision of section 70 of the Indian Succession Act the onus lies on the objector to prove the various circumstances, viz., marriage, burning, tearing or destruction of the will.

(vi) When there is no obvious reason or clear motive for the testator to revoke the will and yet the will is not found on the death of the testator it may well be that the will was misplaced or lost or was stolen by the interested persons. [887B-888A]

Anna Maria Welch & Lucy Allen Welch v. Nathaniel Phillips, [1836] 1 Moore, P.C. 299, Padman & Ors. v. Hanwanta & Ors., AIR 1915 P.C. 111; Finch v. Finch, 1 P & D 371; Anil Behari Ghosh v. Smt. Latika Bala Dassi & Ors., AIR 1955 S.C. 566; Kaikhushru Jehangir v. Bai Bachubai Jehangir

JUDGMENT:

Jullundur v. Dev Raj Vir Bhan & Anr., AIR 1963 Pun. 208; Halsbury's Laws of England, Third Edition, Vol. 39 at 896; Jarman on Wills; Corpus Juris Secundum Vol. 95; referred to.

Babu Lal Singh & Anr. v. Baijnath Singh & Anr., AIR 1946 Pat. 24; Brundaban Chandra v. Ananta Narayan Singh Deo, AIR 1956 Orissa 151; Satya Charan Pal v. Asutosh Pal & Ors., AIR 1953 Cal. 657 at 659-660; Efari Dasya v. Podei Dasya, ILR 1928 Cal. 482 at 486; Shib Sabitri Prasad & Ors. v. The Collector of Meerut, ILR 1907 All 82 at 87; Anwar Hossein v. Secretary of State for India, 31 Cal. 885 at 892, Chouthmal Jivarjee Poddar v. Ramachandra Jivarjjee Poddar, AIR 1955 Nag. 126 at 136 and Pt. Devi Charan v. Durga Porshad Chanu Lal & Ors., AIR 1967 Delhi 128 at 132; approved.

In the instant case while relations between the testatrix and the appellant were very cordial those between her and the respondent were far from being cordial. There could be no occasion for her to suddenly change her mind to revoke the will so as to benefit the respondent whom she despised. Secondly, being an extremely religious and charitable lady, it is difficult to believe that she would shed her inclinations by revoking the will deleting the religious purposes and giving benefit to the respondent to make him the absolute owner of the properties. Thirdly in all the earlier dispositions a clause was inserted prohibiting the trustees from alienating the properties. Had she revoked the will the result would have been that the property would go to the respondent without any conditions, a conduct that would be against her temperament. Fourthly the respondent and his wife had access to

the house of the testatrix and therefore the possibility that he or his wife might have pilfered the will could not be excluded. Lastly there was no evidence that the testatrix had at any time expressed a desire to revoke the will nor was there evidence to show that the respondent was gaining her favour at any time before her death. [888D-H, 889D, G, H] & CIVIL APPELLATE JURISDICTION: Civil Appeal No. 55 of 1969.

From the Judgment and Order dated 15-2-67 of the Delhi High Court in L.A.P. No. 146-D of 1963.

K. T. Hrindra Nath, Gautam Goswami and B. B. Sinha for the Appellant.

Sardar Bahadur Saharya and Vishnu Bahadur Saharya for Respondent No. 1.

The Judgment of the Court was delivered by FAZAL ALI, J.-This appeal by certificate is directed against the judgment of the Delhi High Court dated 15-2-1967 reversing the decision of the single Judge and dismissing the application filed for grant of probate by the appellant of a will said to have been executed by Smt. Jog Maya on the 1st July, 1947 and registered on 9th July, 1947. Smt. Jog Maya died on 22-10-1955. Soon thereafter the appellant who was the sole legatee and executor under the will filed a petition before the District Judge, Delhi for grant of letters of administration or probate.

Put briefly the appellant's case was that Smt. Jog Maya was a resident of Mohalla Rang Mahal, Nahar Sadat Khan, Delhi and although she had an adopted son, namely, the respondent Pt. Devi Charan there was no love lost between Smt. Jog Maya and Devi Charan so much so that in her will the testatrix expressly mentioned that the adopted son should not be permitted to perform her funeral rites on her death nor should he be allowed to touch her body. The appellant Durga Prasad on the other hand was looking after the affairs of the lady and doing her work from time to time. It was perhaps in lieu of the services rendered by the appellant that Smt. Jog Maya executed a will in his favour on 1st July, 1947.

The proceedings for probate were contested by Devi Charan who denied the execution of the will on the ground that Smt. Jogmaya was not of sound disposing mind when she is said to have executed the will but had been persuaded to do so by undue influence exercised by the appellant in executing the will. It was also alleged by the respondent Devi Charan that the will was subsequently revoked and that is why it was not found in the house despite every possible search.

The District Judge accepted the plea of the respondent and dismissed the application for probate by his order dated 3-5-1957. The appellant, therefore, filed an appeal to the High Court which was heard by Mr. Justice P. D. Sharma who reversed the decision of the District Judge and found that the will was a genuine document and had not been revoked. He accordingly allowed the petition of Durga Prasad and issued letters of probate or administration. The respondent went up in appeal to the Division Bench which reversed the finding of the Single Judge and restored the order of the District Judge dismissing the application for probate.

It would appear from a perusal of the Judgment of the Division Bench of the High Court that so far as the factual aspect regarding the execution of he will was concerned it agreed with the findings of fact given by the Single Judge that the will was a genuine document and was duly executed by the testatrix who had a sound disposing mind and no fraud or undue influence at all had been practised in the execution of the will which was witnessed by as many as 7 attesting witnesses some of whom had been examined before the District Judge to prove the execution of the will. In this connection, the High Court observed as follows:-

> "As regards the issue Nos. 1 and 2, as already stated above, the learned Single Judge held that the evidence on record was sufficient to prove that Smt. Jog Maya executed the will (copy) Ex.P. 10, and that she was of sound and disposing mind at the time of the execution, as held by the learned District Judge. But the Courts have thus given concurrent findings on issues Nos. 1 and 2, viz., on the questions as to whether Jog Maya executed the alleged will dated 1st July, 1947, (certified copy of which has been put on the record and marked as Ex. P.10) and whether Jog Maya was of sound and disposing state of mind when she executed the said will".

In view of this categorical finding of the High Court it is manifest that the point in dispute lies within a very narrow compass. The High Court while accepting the genuineness of the will has non-suited the appellant only on the ground that as the will was not found on the death of the testatrix despite every attempt to search for it, a presumption would have to be drawn that the testatrix had revoked the will by destroying it before her death. In view of this presumption the High Court held that the will appears to have been revoked and consequently refused to grant probate to the appellant.

Mr. Hrindranath, counsel for the appellant submitted in the first place that the High Court was in error in applying the presumption of the revocation of the will in view of the express provisions of section 70 of the Indian Succession Act, 1925 hereinafter called the Act. It was contended in the alternative that even if the presumption was available to the respondent, the same being a rebuttable one was sufficiently rebutted by facts and circumstances proved in the case. The High Court has relied on a number of decisions in support of its view that from the fact that the will was not found on the death of the deceased Smt. Jog Maya, a presumption would have to be drawn that the will was revoked by her before her death.

Mr. Saharya, counsel for the respondent on the other hand supported the reasons given by the High Court and submitted that in the circumstances there was no alternative but to draw the presumption that the will was revoked.

Before however deciding the question of law arising in the present appeal, it may be necessary to set out a few facts against the background of which the point of law could be easily decided. It appears that Smt. Jog Maya was a very clever woman and personally looked after her own affairs as found by the High Court. The High Court also found that Smt. Jog Maya was a woman of a very religious and charitable bent of mind and had executed as many as three wills including the will in question and in all of them she had made adequate provision for Puja in the house and other charitable purposes. Smt. Jog Maya had purchased the house situated in Rang Mahal, Nahar Sadat Khan, No. 667, in or

about 1933. She resided in the front portion of the ground floor and leased out the back portion of the ground floor to tenants. She got a temple constructed in the upper storey and installed the idols of Lakshmi Narain and Hanuman, on 11-3-1935. On 7th May, 1935 she executed a will and got regis-

tered on 9th May, 1935. In this will she clearly stated that she was performing Puja and service of the temple from out of the income of the rents of the building. She further declared in the will that the house was made Wakf and dedicated to the temple and would remain so for all times to come. Under the will five respectable persons were made the trustees, but Smt. Jog Maya reserved the right of managing the property to herself and it was only after her death that the trustees were to manage the property and perform Puja etc.

Three years later on 12th July, 1938 Smt. Jog Maya executed another will and got it registered on 18th July, 1938. By this will she revoked the previous will of 1935 and dedicated a part of the house, some deposits in some banks, ornaments and other household goods for the benefit of the temple. She retained the provision that she would manage the property and realise the rents till her life time after which the property was to be managed by seven persons nominated by her under the will. In this will Smt. Jog Maya expressly prohibited the respondent Devi Charan who was her adopted son from performing her funeral rites, but she gave Devi Charan and his wife the right to appropriate the rent of the two houses after the payment of taxes and repairs and after the death of the trustees. There was also a clause which prohibited the trustees from alienating the endowed properties. This will also shows the religious and charitable disposition of Smt. Jog Maya.

The third will which is the will in question was executed on 1st July, 1947 and registered on 9th July, 1947. By this will Smt. Jog Maya cancelled the will of 1938 and declared the same as void and bequeathed all her properties, movable and immovable, to the appellant Pt. Durga Prashad who was also appointed the executor of the will. The will however contains a clear clause that Durga Prashad will be the owner of all the properties he would have no right of alienating the house but would only be entitled to realise the rent and income from the properties which he should spend in the performance of Puja in the temple and appropriate the balance himself. In this will also there was a prohibition clause under which it was said that Devi Charan would have no concern with her estate, movable and immovable, and he should not even touch her dead body. So far as the upper portion of the house is concerned, which was converted into a private temple where a deity was installed that is not the subject matter of the will and there is no dispute about the same. The dispute between the parties centres round the ground portion of the house and other movable properties.

After the death of Smt. Jog Maya the house was locked up by the neighbours and later a search was conducted as a result of which though the original will was not found a draft will almost of the same time as the will in question was found which is Ext. C-

1. No date is given in this draft but Jog Maya has described herself as being 63 years of age which would show that this draft was written almost at the same time as the will. According to this draft, apart from Durga Prashad one Pandit Ram Nath was also appointed as executor and trustee of the properties of Jog Maya. The usual directions for carrying on the Puja and other charitable purposes was also found in this draft. In the draft also it was clarified that Devi Charan had no connection

with the house or with the properties which were the subject matter of the will and had executed a release deed in favour of Jog Maya. As regards Devi Charan the following recitals appear in the draft:

> "I and Devi Charan have not been given rights of alienation and it is also mentioned in the will about Devi Charan that if he remains of good conduct he will be entitled to receive Rs. 10/- p.m. As his character became bad on attaining majority, my father-in-law secured a release deed from him registered at No. 2200, Book I Volume 558 dated 26-8-1929 in my favour. From that time my son Devi has no connection with those houses and with my movable and immovable property..... Eightly. I specially direct that Devi Charan should not perform my funeral ceremonies and the trustees should get them performed by another".

It would thus appear that the relations between the respondent and the testatrix were extremely strained at the time when the will in question was executed and it appears that the testatrix did not wish that the respondent should have anything to do with her properties and any concession she had made in his favour in her two previous wills appears to have been completely withdrawn by the impugned will.

Even Prem Shankar one of the witnesses examined by the respondent clearly admitted that Devi Charan was not made a trustee by that trust deed because Smt. Jog Maya was offended with him. The appellant has also stated in his evidence that relations between the respondent and the testatrix were not good.

A careful analysis therefore of the previous wills or draft executed by Jog Maya show the presence of the following important features in all these documents:-

> 1. That relations between the respondent and Smt. Jog Maya were extremely strained so much so that he was not permitted to perform her funeral rites or touch her body.
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> 2. Substantial provision was made for religious and charitable purposes in all the wills.
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> 3. Express prohibition was made in all the wills regarding alienating the properties by the legatees or the trustees.
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> 4. That in the draft will as also the impugned will Durga Prashad was constituted as the executor of the will.

We will develop these features a little later after discussing the points of law involved in the case.

The High Court appears to have drawn the presumption regarding the revocation of the will from two facts. In the first place, it was found that there was no positive evidence to show that the will was in existence at the time of the death of the testatrix. In this connection, it relied on the evidence

of Durga Prashad that a few days prior to her death Jog Maya had told him that the original will was in safe custody in the bank, but this fact was falsified by the circumstance that when the sealed box kept in the bank was opened no will was found. In our opinion, in the initial application which the appellant gave for grant of probate, he did not mention at all that Jog Maya told him that the original will was kept in safe custody in the bank. This averment was made in an amended application which was given by him before the District Judge. In the circumstances, therefore, we feel that no such statement was ever made by Jog Maya to the appellant who tried to overstate his case which was clearly an after-thought otherwise there was no reason why he should not have mentioned this fact in the initial petition for the grant of probate which he filed before the District Judge. In these circumstances, not much turns upon what Durga Prashad says about the will being in the box. The High Court then relied on the circumstance that in spite of every possible search while the draft Ex. C-1 was in fact found the will was not found at all. The High Court, therefore, drew presumption that the testatrix must have revoked the will by destruction or otherwise.

The question as to whether or not a presumption should be drawn in such cases as a rule of law is extremely doubtful. Moreover, even if any such presumption is drawn the said presumption is rebuttable and may be rebutted either by direct or circumstantial evidence. In the first place, the High Court relied on the case of Anna Maria Welch and Lucy Allen Welch v. Nathaniel Phillips where the Privy Council observed as follows:-

> "Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: "that if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense".

The serious question for us to determine is whether the ratio of this case can be applied to Indian conditions with full force. This matter was clearly considered by the Privy Council in the case from India in Padman & Ors. v. Hanwanta & Ors. where the Privy Council sounded a note of caution in applying the aforesaid presumption to this country having regarding to the nature and habits of the people of our country. While approving the observations of the Chief Court their Lordships in the aforesaid case observed as follows:-

> "We think that the more reasonable presumption in this case is that the will was mislaid and lost, or else was stolen by one of the defendants after the death of Daula.... Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in Welch v. Phillips (1836) 1 Moore, P.C. 299 that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution. In the present case the deceased was a very old man and, towards the end of his life, almost imbecile. There is nothing definite to show that he had any motive to destroy the will or was mentally competent to do so. On the other

> hand, the circumstances favour the view the Chief Court has taken that the will was either mislaid or stolen".

The Privy Council made it very clear that the more reasonable presumption in a case like this should be that the will was mislaid, lost or stolen rather than that it was revoked. The Privy Council further endorsed the fact that the presumption of English law should be applied to Indian conditions with considerable caution. The High Court in the instant case does not appear to have kept in view the note of warning sounded by the Privy Council in the aforesaid case.

There are a large number of authorities of the Indian High Courts which take the view that even if the presumption is applied it should be applied with very great cautions. Before however dealing with these authorities we would like to san the English law on the point.

Jarman on Wills while dwelling on this aspect of the matter observed as follows:

> "If a will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it; but the presumption may be rebutted..... Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box, or other place of deposit where the will was kept, could be obtained by persons whose interest it is to defeat the will".

It is, therefore, clear that even if a presumption of the revocation of the will is drawn from the fact that it was not found on the death of the testatrix it cannot be laid down as a general rule and can be rebutted even by slight evidence particularly where it is shown that some party had access to the place of deposit. The Privy Council has doubted whether this presumption is a rule of law at all.

In Halsbury's Laws of England, Third Edition, Vol. 39 at p. 896 it was thus observed:

> "Where a will is found destroyed or mutilated, in a place in which the testator would naturally put it if he thought he had destroyed it, the presumption is that testator destroyed it, and that the destruction was done animo revocandi..... Similarly, if a will was last traced to the possession of the testator and is not forthcoming at his decease, there is a prima facie presumption, in the absence of circumstances tending to a contrary conclusion that the testator destroyed it animo revocandi. The presumption may be rebutted by evidence, which, however, must be clear and satisfactory. Recent declarations by a testator of satisfaction at having settled his affairs, or of goodwill towards the persons benefited by the will, or of adherence to the will and to the contents of the will itself may be used for this purpose.....The presumption may, it seems, also be rebutted by a consideration of the contents of the will itself".

It appears that so far as the United States is concerned no presumption as a rule of law can be drawn where the will is lost but the matter depends on the statute of a particular State. In Corpus Juris Secundum Vol. 95 it has been observed as follows:-

> "Since, in accordance with the general rule that a will speaks from the death of the testator, an instrument which has been duly executed as a will, and never been revoked, becomes effective on the death of the testator although it cannot be found or is not in existence, it is a well settled general rule, which in some jurisdictions is in effect prescribed by statute, that a will which has been lost or destroyed, either after the testator's death or accidentally or fraudulently during his lifetime, may be established or admitted the probate, as by admitting a properly proved copy or duplicate of the will to probate or by a proceeding in accordance with the statute, in the court having jurisdiction thereof, and on competent and sufficient proof of its execution, loss, or destruction, and contents".

Thus, it is manifest that in the first place when the will is traced to the possession of the testator but not found at the time of death, no presumption can be drawn as a rule of law but in the facts and circumstances of a particular case such a presumption may be drawn and can be rebutted even by slight evidence.

In the case of Finch v. Finch(1) the Court observed as follows:-

> "There is no doubt that if a man dies, after duly executing a will, and at the time of his death his will, having remained in his custody, is not in existence, the law presumes that it was revoked. But in all such cases the question to be determined is, whether the will was or was not in existence at the time of the death"
>
> "The evidence certainly points strongly in that direction, and there is nothing to shew any change of intention which was likely to lead to the revocation of the will. He had evidently not changed his mind when he last spoke to his daughter on the subject, and, as to the three weeks that elapsed between that conversation and his death, the evidence is a perfect blank. There is nothing to shew any change of intention, but there is evidence that, during that interval, he was not on good terms with his son, and that, although they were living in the same house, they did not speak to each other".

Although the Court stated the law clearly that a presumption in such circumstances could be drawn it held that the presumption was rebutted by the important fact that there was nothing to show that there was any other in the intention of the testator to revoke the will. On the other hand, strained relations between the father who was the testator and the son continued. In these circumstances, it was held that the presumption was rebutted.

Against this background we shall now deal with the authorities of the Indian High Courts. But before we do that it may be necessary to extract section 70 of the Act:

> "No unprivileged will or codicil, nor any part thereof shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same".

A perusal of this section would clearly reveal two important features. In the first place, the section has been couched in negative terms having a mandatory content. Secondly, the section provides the mode and the circumstances under which an intention to revoke can be established. In these circumstances, therefore, the onus is on the objector who relies on the revocation to prove that the will had been revoked after it has been proved to have been duly executed. Under section 70 of the Act the will can be revoked inter alia, by burning, tearing or otherwise destroying and unless any of the circumstances has been proved by the objector by cogent evidence, the question of the revocation of the will naturally not arise. While construing this section, this Court in the case of Anil Behari Ghosh v. Smt. Latika Bala Dassi & Ors. observed as follows:-

> "For proving that the will had been revoked, it had to be shown that the testator had made another will or codicil or by some writing declared his intention to revoke the will.
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> Such a document is required by s. 70 of the Act to be executed in the same manner as a will. Such a revocation could also have been proved, as the section lays down, by turning, tearing or otherwise destroying the will by the testator himself or by some other person in his presence and by his direction, thus clearly indicating his intention of revoking the will".

Applying these observations to the facts of the present case there is absolutely no evidence to show that even though Smt. Jog Maya had made a registered will in favour of the appellant she revoked it at any time in the manner enjoined by section 70 of the Act.

In the case of Kaikhushru Jehangir v. Bai Bachubai Jehangir & Ors. while construing section 70 of the Act it was pointed out that a will cannot be revoked by implication. In this connection, the Court made the following observations:-

> "Under the statute it is necessary to establish an intention to destroy. There cannot be any revocation by necessary implication. The revocation can only be by one or the other of the modes which are specified in the statute, and so far as we are here concerned, these modes are specified in section 70, Succession Act".

In the case of Babu Lal Singh & Anr. v. Baijnath Singh & Anr. a Division Bench of the Patna High Court while referring to the Privy Council case of Welch v. Phillips (supra) observed as follows:-

> "In my opinion the essential condition of the rule of English law 'if a will traced to the possession of the deceased and last seen there is not forthcoming on his death' has not been established. Therefore the presumption of law on which Mr. Das laid much stress has no application to the facts of the present case .....The onus primarily lies on the party propounding the copy to account for the absence of the original ..... Thus there is nothing to show any change of intention, which was likely to lead to the revocation of the will. In the circumstances the only reasonable inference is that the document is either mislaid or lost. The loss of a will does not operate as a revocation. It has been established that the will was duly executed by Man body and there is no uncertainty about the contents of it as a certified copy of it has been produced".

We are inclined to agree with the view taken by the Patna High Court.

In the case of Arya Printinidhi Sabha, Punjab Jullundur v. Dev Raj Vir Bhan and Anr. it was clearly pointed out that the presump-

tion of English law has to be applied with great caution and the Court observed as follows:

> "The rule is now firmly settled that the presumption of English law that when a will is traced to the possession of the deceased and is not forthcoming at his death, is that he has destroyed it, must be applied in India with considerable caution".

In the case of Brundaban Chandra v. Ananta Narayan Singh Deo a Division Bench of the Orissa High Court has rightly observed as follows:-

> But there is formidable English authority for the proposition that if a testament was in the custody of the testator at the time of his death and is not forthcoming on his death it is presumed to have been destroyed by himself..... This presumption can however be rebutted; and the weight to be attached to such presumption will depend upon the character of the custody which the testator had over the will. In England wills are usually deposited either in a Bank or with a Solicitor. But the same presumption is hardly applicable in all circumstances in India where the habits and conditions of the people vary. Here in India, deeds are not preserved with that amount of care as is done in England..... On the other hand, where a document is registered no care is taken at all of its custody as a certified copy is easily available, and the law allows its production in proof of the original. Consequently, having regard to the habits and conditions of the people here, when a document like a registered will is not forthcoming after the testator's death, presumption may well arise that it has been mislaid as seems to have happened here ..... It follows that in this country a presumption of revocation of a will cannot be drawn merely from the fact of its disappearance. ..... Where a will makes a careful and detailed disposition of the testator's properties and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box or other

> place of deposit where the will was kept can be obtained by persons whose interest it is to defeat the will".

We find ourselves in agreement with the view taken by the High Court.

To the same effect are the decisions in Satya Charan Pal v. Ashutosh Pal & Ors., Efari Dasya v. Podei Dasya, Shib Sabitri Prasad & Ors. v. The Collector of Meerut, Anwar Hossein v. Secretary of State for India, Chouthmal Jivarjee Poddar v. Ramachandra Jivarjee Poddar and Pt. Devi Charan v. Durga Porshad Chhanu Lal & Ors..

The correct legal position may therefore be stated as follows:

> 1. That where a will has been properly executed and registered by the testator but not found at the time of death the question whether the presumption that the testator had revoked the will can be drawn or not will depend on the facts and circumstances of each case. Even if such a presumption is drawn it is rather a weak one in view of the habits and conditions of our people.
>
> 2. That the presumption is a rebuttable one and can be rebutted by the slightest possible evidence, direct or circumstantial. For instance, where it is proved that a will was a strong and clear disposition evincing the categorical intention of the testator and there was nothing to indicate the presence of any circumstance which is likely to bring about a change in the intention of the testator so as to revoke the will suddenly, the presumption is rebutted.
>
> 3. That in view of the fact that in our country most of the people are not highly educated and do not in every case take the care of depositing the will in the bank or with the Solicitors or otherwise take very great care of the will as a result of which the possibility of the will being stolen, lost or surreptitiously removed by interested persons cannot be excluded, the presumption should be applied carefully.
>
> 4. That where the legatee is able to prove the circumstances from which it can be inferred that there could be absolutely no reason whatsoever for revoking the will or that the act of revoking the will was against the temperament and inclination of the testator, no presumption of revocation of the will can be drawn.
>
> 5. That in view of the express provision of section 70 of the Act the onus lies on the objector to prove the various circumstances, viz., marriage, burning, tearing or destruction of the will.
>
> 6. When there is no obvious reason or clear motive for the testator to revoke the will and yet the will is not found on the death of the testator it may well be that the will was misplaced or lost or was stolen by interested persons.

We shall now apply the aforesaid principles to the facts of the present case. It is true that the impugned will despite search was not found at the time of death of the testatrix. At the same time it cannot be gain-said that the clear finding of the courts below is that the will was definitely executed by the testatrix with a sound disposing mind and had been attested by as many as 7 witnesses and had been proved. We have already indicated the essential features common to all the will executed by the testatrix in the past and three things appear to be very conspicuous:

> 1. That relations between the testatrix and Durga Prashad were very cordial, and therefore, there could be no occasion for the testatrix to suddenly change her mind to revoke the will so as to benefit the respondent a person whom she so detested that she made a provision in the will to the effect that he should not be permitted to touch her dead body or perform her funeral rites.
>
> 2. The lady was of an extremely charitable and religious bent of mind and she made substantial provision for religious and charitable purposes in all the wills including the draft will Ex. C-1. She would not without any reason revoke the will which contained clear and strong provision regarding religious and charitable purposes. It is difficult to believe that she would shed her religious and charitable inclination by revoking the will and deleting the religious and charitable purpose contained in the will so as to benefit the respondent and make him the absolute owner of the properties without any restriction. This seems to be wholly improbable.
>
> 3. That in all the dispositions Smt. Jog Maya had seen to it that a clause was inserted in the will under which the legatee or trustee was prohibited from alienating the properties. Indeed, if she revoked the impugned will the result will be that the property would go to the respon-
>
> dent without any conditions or restrictions, a conduct that would be against the temperament of the testatrix.

Apart from these features, there are other circumstances which go to show that the will was not revoked by the testatrix.

R.W. 3 admitted that Devi Charan respondent never lived in the house (house of Jog Maya) but he used to visit it once or twice a month. Similarly, R.W. 7, another witness for the respondent, admits that Devi Charan used to visit Smt. Jog Maya previous to her death. Even the respondent Devi Charan admits clearly in his evidence that as he was not well, his wife had gone to see Smt. Jog Maya on the previous evening of her illness. In this connection, the statement of Devi Charan runs thus:-

> "I came to know about her illness on the previous evening. As I was not well, my wife went to see how Smt. Jog Maya was."

From the evidence adduced by the respondent himself, therefore, it appears that Devi Charan had clear access to the house of Jog Maya which he visited off and on and his wife visited the house even during the illness of Jog Maya which resulted in her death. Devi Charan was fully aware that the will executed by Jog Maya completely deprived him of any interest in the properties. In these circumstances, the possibility that either Devi Charan or his wife may have pilfered or stolen the will in order to deprive the appellant of its benefits cannot be excluded. In this connection, it may be noted that the respondent has stated in his evidence that he complained to Jog Maya that he had been deprived of his right by making a trust in the name of Durga Prashad and Ram Nath and she assured him that she would destroy the trust deed and would make him the owner of the property. This statement is undoubtedly false and would not have been made by a woman of the nature and character of Jog Maya. Indeed, if the statement was made to him in August, 1955 as mentioned by the witness in his evidence, then there was no reason why, when the respondent filed his first objection on 27-1-1956 before the Sub-Judge Delhi, he did not mention it there nor even in the second objection and the additional pleas filed by him before the District Judge, Delhi. This shows that his statement in court is absolutely false and is made merely for the purpose of defeating the claim of respondent.

Again it appears that although the will was executed in 1947, about 8 years before her death, Smt. Jog Maya never expressed her intention to revoke the will at any time during this period to any of the attesting witnesses of the will or to Pt. Ram Nath who was a trustee under the draft will of her intention to revoke the will. It is difficult to believe that she would leave the entire property to the respondent whom she hated so much.

Further, there is absolutely no evidence to show that Devi Charan succeeded in gaining the favour of or winning the confidence of Smt. Jog Maya at any time before her death so as to put her in a mood to leave the entire property absolutely to him after her death by revoking the impugned will. Nor is there anything to show that the respondent estranged the testatrix from the appellant to such an extent that the appellant fell in her estimation. It is also neither pleaded nor proved that since the execution of the impugned will any circumstance existed or incident happened which brought about a serious estrangement between the appellant and the testatrix so as to induce her to revoke the will.

Having regard to these circumstances mentioned above which do not appear to have been considered by the High Court at all we are clearly of the opinion that the presumption if any, that the will was revoked by Smt. Jog Maya has been sufficiently rebutted and the objector has miserably failed to discharge the onus which lay on him to prove that the will was revoked. Moreover, the will being a registered one and being the product of the free will of the testatrix there must be strong and cogent reasons for holding that it was revoked. The fact that the will was not found despite search at the time of death of Smt. Jog Maya in the circumstances is not sufficient to justify a presumption that the will was revoked. In the circumstances of this case particularly having regard to the fact that the respondent who would be interested in destroying the will had an access to the house of the testatrix, the presumption would be that the will was either stolen or misplaced by him or at his instance.

For these reasons, we allow this appeal with costs, set aside the judgment of the Division Bench of the High Court and restore the judgment of the Single Judge of the High Court and allow the application of the appellant for probate.

N.V.K. Appeal allowed.