

GAHC010007112020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Test.App./1/2020

SRI HIRANYA KUMAR BARUAH
S/O KRISHNA PRASAD BARUAH, R/O GYANKONICA APARTMENT,
BLOCK 3/3 B BASISTHAPUR BYE LANE MO. 3, BELTOLA, GUWAHATI-
781028, P.S. BASISTHA, DISTRICT, KAMRUP(M), ASSAM.

VERSUS

SRI RAJIB BARUAH AND 4 ORS
S/O LATE SIBA PRASAD BARUAH, R/O BORDOICHILA BHAWAN, FLAT NO.
AN2, BLOCK A, 2ND FLOOR, G.S. ROAD, P.S. DISPUR, GUWAHATI-781005,
DISTRICT KAMRUP(M), ASSAM.

2:SRI SANJIB BARUAH
S/O LATE SIBA PRASAD BARUAH
R/O BORDOICHILA BHAWAN
FLAT NO. AN4
BLOCK A
4TH FLOOR
G.S. ROAD
P.S. DISPUR
GUWAHATI-781005
DISTRICT KAMRUP(M)
ASSAM.

3:SMTI DEBIKA BORPUJARI
W/O GUNIN BORPUJARI
R/O BORDOICHILA BHAWAN
FLAT NO. AN I
BLOCK A
1ST FLOOR
G.S. ROAD
P.S. DISPUR

GUWAHATI-781005
DISTRICT KAMRUP(M)
ASSAM. PRESENTLY RESIDING AT 3 MARIA MANSION VIDYA NAGAR
MARG
KALINA
MUMBAI-400098

4:SMTI INDRANI SARMA
W/O DEEP SARMA
R/O BORDOICHILA BHAWAN
FLAT NO. AN3
BLOCK A
3RD FLOOR
G.S. ROAD
P.S. DISPUR
GUWAHATI-781005
DISTRICT KAMRUP(M)
ASSAM. PRESENTLY RESIDING TA LAKHIMI PATH
R.G. BARUAH ROAD
HOUSE NO. 23
GUWAHATI-781024
DISTRICT KAMRUP(M)
ASSAM

5:SRI DWIJEN CHANDRA GOSWAMI
S/O LATE SIVA NATH GOSWAMI
R/O VILL. TEOK MAHRYU SUTRA
P.S. TEOK
DIST. JORHAT
ASSAM. PRESENTLY RESIDING AT BORDOICHILA BHAWAN
FLAT NO. AN5
BLOCK A
5TH FLOOR
G.S. ROAD
P.S. DISPUR
GUWAHATI-781005
DISTRICT KAMRUP(M)
ASSAM

Advocate for the Petitioner : MR. A R MEDHI

Advocate for the Respondent :

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the petitioners : Mr. A. R. Medhi, Advocate.

For the Respondents :

Date of Hearing : 15.05.2023, 22.05.2023

Date of Judgment : 22.05.2023

JUDGMENT & ORDER (ORAL)

1. Heard Mr. A. R. Medhi, learned counsel for the appellant. None appears for the respondents, though notice was duly served.
2. The present appeal under Section 299 of Indian Succession Act 1925 read with Order XLI of the Code of Civil Procedure, 1908 is filed assailing the judgment dated 25.11.2019 passed by the learned Additional District Judge No. 2, Kamrup (M) Guwahati in Probate Title Suit No. 11/2018 arising out of Misc Probate Case No. 6/2014 dismissing the Probate petition preferred by the petitioner/appellant.
3. The probate case has been dismissed by the learned Court below on the ground that the petitioner has failed to produce any of the attesting witnesses who prove the Exhibit-1 (Will).
4. The learned Court below came to a finding that one attesting witness Siba Prasad Baruah, the husband of the testatrix died and other witness namely Sanjib Kumar Baruah, who was the son of the testator was also not

examined and there is no explanation why the said attesting witnesses were not examined. Accordingly, the learned Court below came to a conclusion that the petitioner has failed to prove the execution of the will by not introducing any of the attesting witness as mandated under Section 68 of the Indian Evidence Act, 1872.

5. The learned counsel for the appellant submits that the present appellant was the executor of the will and he was also one of the attesting witnesses and he deposed before the learned Court as an attesting witness and proved the signature of the executrix as well as the execution of the will. Therefore, under Section 68 of the Indian Evidence Act, 1872, the appellant though was an executor of the will, is not disqualified as a witness to prove the execution of the will or prove the validity or invalidity thereof.
6. This Court has given anxious considerations to the submissions made by the learned counsel for the parties. Also perused the materials available on record.
7. In terms of Section 63 (c) of the Indian Succession Act, 1925, a valid WILL requires the following pre requisites:
 - i. The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will, Or
 - ii. has seen some other person sign the Will in the presence of the testator and under the direction of the testator, or
 - iii. has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and

- iv. each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.
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- 8. The sole ground for rejection of the probate was that no attesting witnesses were examined and accordingly, suit is hit by Section 68 of the Indian Evidence Act, 1872.
 - 9. In terms of section 68 of the Evidence Act, 1872, a document required by law to be attested shall not be used as evidence until one attesting witness, at least, has been called for the purpose of proving its execution subject to an attesting witness being alive and subject to the process of the Court and capable of giving an evidence.
 - 10. Therefore, to be a valid WILL and to get a probate or Letter of Administration, the requirements mandated under Section 63 of Indian Succession Act, 1925 and Section 68 of Indian Evidence Act, 1872 must be fulfilled. Thus it is to be proved that the WILL has not only been executed in terms of Section 63 of Indian Succession Act, 1925 but also in terms of section 68 of the Indian Evidence Act, 1872.
 - 11. The WILL, which was exhibited as Exhibit-1, shows that one Mrs. Renuka Baruah bequeathed the Schedule property appended to the WILL in the name of one Sri Dwijen Chandra Goswami being her cousin. The WILL also discloses that the present appellant namely Sri Hiranya Kumar Baruah was appointed as sole executor of the WILL. Thus it is clear that the present appellant was sole executor to the WILL of Mrs. Renuka Barooah.

12. The PW-1 i.e. Hiranya Kr. Baruah, in his evidence-on-affidavit stated that the WILL was signed by the testatrix Late Mrs. Renuka Baruah in presence of her husband Siba Prasad Baruah and Son Sanjib Kr. Baruah and one builder Sri Sukumar Barthakur. He also deposed that Siba Prasad Baruah and Sanjib Kr. Baruah also put their signatures' as witness in his presence and he identified the signatures of Mrs. Renuka Baruah, Siba Prasad Baruah and Sanjib Kr. Baruah and exhibited their signatures and also exhibited the original WILL. The executor, Hiranya Kr. Baruah also deposed that Exhibit-12 and 13 are his signatures.
13. The WILL, shows that the petitioner also signed as witness to the WILL. He proved his signature as Exhibit-13 as witness. Exhibit 12 is also his signature put over the envelop, inside which, the WILL was kept sealed. He has also proved in his evidence that he saw the testatrix signing the WILL, he was present while WILL was executed and proved his signature as witness. He also deposed that he also knows the signatures of other witnesses and saw while putting their signatures.
14. Thus from the aforesaid, it is apparent that Hiranya Kr. Baruah (appellant) put his signature in the WILL as witness and there were total three attesting witnesses to the WILL.
15. Though the another son of the Executrix namely Rajib Baruah appeared before the learned court below and filed objection but no fraud or doubt was pleaded and subsequently, no evidence was laid by the said son and the suit proceeded ex-parte. The other legal heirs of the prosecutrix did not appear and content the proceeding.

16. In the case in hand and as discussed herein above, the PW1 successfully proved the attestation of the WILL in question not only by him but by the other attesting witnesses. Thus in the considered opinion of this Court requirement of the Section 63 was duly fulfilled in execution the WILL.
17. As one attesting witness was examined to prove the WILL, in terms of the Section 68 of the Indian Evidence Act, 1872 the examination of the other attesting witness was not necessary.
18. In the present case the fact also remains that there is no allegation of any fraud or suspicious circumstances by the other son of the executrix. Though he had filed an objection to the WILL on some other ground, however, later on he did not contest the WILL either by leading evidence or by cross examining the witnesses of the petitioner.
19. Thus from the aforesaid, it is clear that the present appellant had dual role in the execution of WILL, one as executor and other as witness to the execution..
20. In terms of Section 68 of the Indian Evidence Act, 1872, a WILL is to be proved by at least one attesting witness. In the considered opinion of this Court, such requirement has been fulfilled through the deposition of PW-1 i.e. the executor cum attesting witness of the WILL.
21. Section 68 of the Indian Succession Act, 1925, mandates that an executor is not disqualified as a witness to prove the execution of a WILL to prove the validity and invalidity thereof.
22. Therefore, in view of the aforesaid clear term, the learned Court below

has committed serious illegality in holding that the executor has failed to produce any attesting witnesses and therefore, WILL was not proved as mandated under Section 68 of the Indian Evidence Act, 1872.

23. Accordingly, the probate as prayed for be granted. Accordingly, it is directed that the learned Court below shall grant the probate under its seal in terms of Section 290 of the Indian Succession Act, 1925 and in terms of Schedule-8.
24. The petitioner shall deposit the original WILL before the learned Court below, if not already deposited or returned after disposal of the probate proceeding.
25. Accordingly, the present appeal stands allowed.

JUDGE

Comparing Assistant