IN THE HIGH COURT OF TRIPURA
A G A R T A L A

RSA No.14 of 2023

Sri Dulal Baidya
son of late Manoranjan Baidya, resident of village-Sarashima, P.O. Sarashima, P.S. Belonia, District-South Tripura

..... Appellant

– V e r s u s –

1. **Anil Sarkar (Dey),**
   son of late Cheori Sarkar (Dey)

2. **Jagadish Sarkar (Dey),**
   son of late Cheori Sarkar (Dey)

3. **Parimal Sarkar (Dey) @ Bishweshar Sarkar (Dey),**
   son of late Cheori Sarkar (Dey)

-all are residents of village-Sarashima, P.O. Sarashima, P.S. Belonia, District-South Tripura

..... Respondents

For the Appellant(s)	:	Mr. P. Roy Barman, Sr. Adv. Mr. K. Nath, Adv.
For the Respondent(s)	:	Mr. R. R. Datta, Adv. Mr. K.L. Pal, Adv.
Date of hearing	:	20.08.2024
Date of delivery of Judgment & order	:	**04.12.2024**
Whether fit for reporting	:	YES: √ / NO:

HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA

JUDGMENT & ORDER

The appeal arises out of the judgment dated 22.03.2023 passed by the learned District Judge, South Tripura, Belonia in Title

Appeal No.04 of 2022 and related decree thereof, whereby the learned first appellate court dismissed the appeal by way of affirming the judgment and decree passed by the learned Civil Judge (Jr. Division), Belonia, South Tripura in Title Suit No.26 of 2019, whereby the suit of the plaintiff-appellant for declaration of his right, title and interest in the suit land and recovery of possession was dismissed.

[2] The claim of the appellant (hereinafter referred as *the plaintiff*) is that the father of the plaintiff was the owner of a total 0.10 acres of land of Mouja-Sarasima recorded in Khatians No. No.808/1 and 808/2 [described in 'A' Schedule of the plaint] and during his lifetime, he executed one registered 'Will' on 07.05.1997 bearing No.III-1198 bequeathing the property in favour of the plaintiff. The father of the plaintiff died on 16.12.2010. However, as the respondents (hereinafter referred as *the defendants*) are the close relatives of the father of the plaintiff, they were allowed by his father to use 0.06 acres of land [described in 'B' Schedule of the plaint] and they have been in possession of the suit land. After the death of the father of the plaintiff, the plaintiff became the owner of the suit land and requested the defendants to vacate the same and even served Advocate notice twice, but getting no affirmative response from the defendants, the plaintiff instituted the suit for declaration of his right, title and interest and recovery of possession of said 'B' Schedule land.

[3] The defendants in their written statement have admitted categorically that father of the plaintiff, namely Lt. Manoranjan Baidya was the recorded owner of the suit land. According to them, they are not the relative of the father of the plaintiff but they are the adjacent neighbours. They denied any sort of permissive possession over the suit land rather, they are having 50 years of possession in the suit land. According to them, during the lifetime of late Manoranjan Baidya, he on several occasions, requested the defendants to vacate the suit land but they denied and with hostile animus, they started possessing the same more particularly from 01.01.1996, when both father of the plaintiff along with the plaintiff and his brother requested them to vacate it and they flatly refused. They further state that the plaintiff has one brother and three sisters left by his father as legal representatives who were also necessary parties in the suit. Regarding the will, their assertions are that they did not know anything about the execution of any such will and whether the plaintiff has become owner of the suit land by virtue of that will. However, they do not directly challenge the authenticity of the will.

[4] Before the trial court, the plaintiff examined himself and another witness, namely Dulal Shome as PW-2 and also proved certain documents into the evidence including the said will [Exbt.8] and certified copies of finally published Khatians No.808/1 & 808/2 (Exbts.1 & 2 respectively). Similarly, the defendants No.1 & 3

examined themselves as DW-1 & 2 respectively but did not rely on any documentary evidence.

[5] The learned trial court dismissed the suit *inter-alia* on the ground that as per the record, the defendants were the permissive occupiers of the suit land but there was no whisper of the said fact in the said will and more so, no step was taken by the father of the plaintiff to evict the defendants therefrom during his lifetime. Learned trial court even observed further that the said testator had other children but there was no clarification in the will as to why he had bequeathed the entire property to the plaintiff only. Another ground of dismissal of the suit was that the plaintiff had also failed to clarify as to why he had not taken any action within 3 years after becoming the owner of the suit property and therefore, for the above said reasons, doubt arose regarding the authenticity of the will.

[6] Learned first appellate court while endorsing such observations of the trial court, further observed that the plaintiff in his cross-examination failed to mention as to how his father became the owner of 0.10 acres of land. Even the learned first appellate court also observed that the will was executed in the year 1997 but the testator died in 2010 and therefore, there was a long gap between the execution of the will and the death of the testator and moreover, it was not clear as to why the plaintiff did not take any initiative to evict the defendant No.2 from the suit land during

the lifetime of his father. With all these observations, the learned first appellate court also dismissed the appeal.

[7] The appeal was admitted by this court on the following substantial questions of law:

> **[i] Whether findings of both the courts below are perverse?**
>
> **[ii] Whether the decree has been passed on consideration of irrelevant facts and issues?**

[8] During hearing, Mr. P. Roy Barman, learned senior counsel appearing for the appellant seriously challenges the impugned judgment and decree on the ground that there was no direct challenge regarding the authenticity of the will by the defendants but both the learned courts below had swayed away with certain extraneous facts going beyond the pleadings of the parties leading to perverse findings and making out a third case beyond the cases of the parties. Mr. Roy Barman, learned senior counsel also argues that the attesting witnesses of the will were dead and even the scribe i.e. the deed writer was also no more and therefore, another witness conversant with the handwriting of the attesting witnesses and the scribe was examined and the will was duly proved. Learned senior counsel also argues that during cross-examination, DW-1 specifically denied the ownership of the father of the plaintiff in the suit land and therefore, they were barred from claiming adverse possession in the suit land and moreover, he

himself also denied the fact of adverse possession in his evidence going contrary to his own pleadings.

[9] Mr. R.R. Datta, learned counsel appearing for the defendant-respondents on the other hand, submits that permissive possession of the defendants was not proved by the plaintiff as the same was not mentioned in the will and that itself was a patent ambiguity in the will and moreover, the will was also not properly proved in terms of Sections 67 & 68 of the Indian Evidence Act by producing the attesting witnesses. The next point of argument of Mr. Datta, learned counsel is that the ROR was not a document of title and the plaintiff in his cross-examination also admitted that he did not know as to how his father got the property and therefore, ownership of father of the plaintiff was also not proved. According to learned counsel, sufficient reasoning was given by both the learned courts below and therefore, re-appreciation of evidence was not permissible in the second appeal and the second appeal was in fact not maintainable.

[10] Mr. Datta, learned counsel also raises a point that under Article 58 of the Limitation Act, the suit ought to have been filed within 3 years from the date of death of the testator and therefore, it was time barred. Another point raised by Mr. Datta, learned counsel is that the suit was bad for non-joinder of necessary parties as another brother and sisters of the plaintiffs were not impleaded in the suit and moreover, out of a total 0.10 acres of land, as per

ROR, the rest 0.04 acres of land excluding the 'B' Schedule land was in possession of one Jahar Chowdhury but no relief was claimed against him. Mr. Datta, learned counsel also relies on the following decisions:

(i) **Jahar Lall Paul v. Asit Kumar Pal and others, AIR 2014 (NOC) 163 (CAL)** wherein the following were noted:

> **Succession Act (39 of 1925), Ss.63,222- Probate of Will-Grant of - Will not containing the statement/endorsement that the attesting witnesses had signed in presence of the testatrix-Statement by attesting witness that he signed on Will in presence of executor found false as executor was not there at time of execution and registration of Will-Non-compliance with requirements of proof of Will-Grant of probate, not proper.**

(ii) **Damodar Lal vs. Sohan Devi & Ors., Devi (2016) 3 SCC 78,** wherein it was observed by the Apex Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on no evidence or are perverse. It was also observed that even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. The safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse.

(iii) **Israel Gaddi vs. Karuna Dutta Mishra and others, AIR 2023 Patna 36**, and the relevant paragraph-27 as referred is extracted below:

> **27. The plea of adverse possession in alternative has been taken by the respondent. The learned appellate Court rightly noted that burden of proof always lies on the plaintiff. Case must stand or fall on own pleadings and proof of plaintiff's case. The plaintiff cannot take benefit of weakness of the defendant. The trial Court also noted that defendants has also taken the plea of adverse possession but the case of plaintiff is going on its own demerit in the plaint itself. So, it will be futile to discuss in detail about the case of defendant.**

[11] Taking note of the rival submissions of the parties, the first point falls for consideration of the court is that what is the proper procedure to prove a will and whether the same was complied with by the plaintiff in the instant case.

[12] In this context, relevant decision rendered in **Babu Singh and others. vs. Ram Sahai @ Ram Singh, (2008) 14 SCC 754** can be taken care of, wherein the followings were observed by the Apex Court:

> **14. In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation, as the words 'at least' have been used therein. When genuineness of a will is in question, apart from execution and attestation of will, it is also the duty of a person seeking declaration about the validity of the will to dispel the surrounding suspicious circumstances existing, if any. Thus, in addition to proving the execution of the will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the will would, inter alia, depend thereupon.**

> **15. The Court, while granting probate of the will, must take into consideration all relevant factors. It must be found that the will was product of a free will. The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. Where, however, a plea of undue influence was taken, the onus wherefor would be on the objector and not on the offender. [See Savithri vs. Karthyayani Amma & Ors., (2007) 11 SCC 621]**
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> **16. Section 69 of the Act reads, thus :**
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> ***"Section 69 Proof where no attesting witness found.-If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."***
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> **17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.**

[13] Later on, in **Ashutosh Samanta (D) by Lrs. and ors. vs. SM Ranjan Bala Dasi and others, 2023 SCC OnLine SC 255** also, the said principle rendered in **Babu Singh** case was reiterated with the observation that in the event where attesting witnesses may have died, or cannot be found, the propounder is not helpless, inasmuch as Section 69 of the Evidence Act is applicable in that case. The Apex Court in this case also took note of another earlier decision rendered in **K. Laxman vs. Padmini**, Civil Appeal No.7082 of 2008 decided on 03.12.2008 and extracted the following paragraph of the said decision:

> **"Since both the attesting witnesses have not been examined, in terms of Section 69 of thte Act it was incumbent upon the Appellant to prove that the attestation of at least one attesting witness is in his handwriting and that the signature of the person**

> **executing the document is in the handwriting of that person……."**

[14] Admittedly the present will is an unprivileged will which as per Section 63 of the Indian Succession Act is required to be mandatorily attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of witnesses is required to sign the will in the presence of the testator. But it is not necessary that more than one witness is required to be present at the same time, and no particular form of attestation is also prescribed.

[15] Section 68 of the Indian Evidence Act [now Section 67 of the Bharatiya Sakshya Adhiniyam, 2023] stipulates that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence; provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

Therefore, the above said provision mandates examination of at least one attesting witness in proving the will if he is alive and subject to the process of court and also capable of giving evidence.

[16] Section 69 of the Indian Evidence Act [now Section 68 of the Bharatiya Sakshya Adhiniyam, 2023] also stipulates that if no such attesting witness can be found, it must be proved that the attestation of the attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. Therefore, as per the above said provision when the attesting witnesses are not alive, two things are required to be proved by the person attempting to prove a will into evidence; firstly, that attestation of one witness at least was in his handwriting and secondly, that the signature of the person executing the document was in his handwriting.

[17] In the instant case in hand, PW-2 namely Dulal Shome deposed that the will was executed by Manoranjan Baidya in favour of his son Dulal Baidya and it was written by deed writer, Krishnadhan Muhuri who died 25 years back and he was acquainted with the hand writing of the said scribe Krishnadhan Muhuri. He also identified the handwriting of said Krishnadhan Muhuri in the will. He further deposed that the attesting witnesses of the will namely, Nirmal Chandra Sen, Prafulla Malakar and Benimadhav Mahajan were also deed writers who were no more and he also identified the signature of those attesting witnesses and the learned

trial court ultimately, took the will into evidence marking it as Exbt.8 as a whole. Such procedure as adopted by the learned trial court for making the entire document containing different signatures as Exbt.8 as a whole in strict sense was not proper. It would be better if separate scrutiny would be given for separate signatures and separate marking for the contents of the will. Anyway, this is purely a procedural matter of technical nature which can be ignored but what is lacking in the evidence is that that none of the witnesses of the plaintiff proved the signature of the testator in the will which according to Section 69 of Evidence Act is compulsory. Therefore, the will was not duly proved by the plaintiff only on that ground.

[18] Apart from the said will, the plaintiff also proved the death certificate of Manoranjan Baidya [Exbt.4] which bears the date of death of Manoranjan Baidya as 16.12.2010. The plaintiff also proved two Khatians bearing No.808/1 and 808/2 [Exbts.1 & 2 respectively] and Khatian No.808/1 more particularly refers to the suit land under Schedule 'B' of the plaint, wherein at column No.16 names of the defendants are shown to be the permissive possessors under the testator. It is also admitted by the defendants in the written statement that the father of the plaintiff was the owner of the suit land. Therefore, the question of the ownership of the suit land by the father of the plaintiff is not under challenge in the suit. No separate mutated Khatian, if any, in the name of the

present plaintiff is proved into evidence by him to show that the plaintiff was recognized by the Government as Riyat of the suit land on the basis of the said will. In such a situation, the will appears to be a vital document to establish sole ownership of the plaintiff in this suit land. The defendants in their written statement have claimed adverse possession over the suit land w.e.f. 01.01.1996. However, before it is decided as to whether the defendants have been able to prove their adverse possession in the suit land, it appears to the court that for bringing all the materials into evidence in a proper way to administer proper justice to the parties, the plaintiff should be given a scope to adduce further evidence to prove the will properly and thereafter, to decide the matter afresh keeping in view of the evidences placed by both the parties into evidence. The court is also simultaneously not oblivious of the fact that already the defendants have suffered some financial loss in defending the suit both in the learned trial court as well as in the learned first appellate court and finally before this court.

[19] The court is also constrained to observe that both the learned trial court and the learned first appellate court have travelled beyond the pleadings of the parties by observing different extraneous factors which gives an impression that both the courts below scrutinized the case of the plaintiff and the 'Will' with spectacle of suspicion. At least the observations of the learned trial court, such as non-mentioning the name of the defendants in the

Will as the permissive occupier or their eviction from the suit land by the testator and that the testator despite having other children did not clarify in the will as to why he did not bequeath any land in favour of his other children and further observation of the learned first appellate court that the plaintiff during the lifetime of his father never approach the defendants to vacate the suit land and that there was a long gap between the date of execution of the will and the death of the testator, create such impression.

[20] Law does not confer any power upon the learned trial court or the learned first appellate court to create a third case of the parties which are not at all pleaded by them and therefore, they should refrain from doing so. Law never says that if there is a long gap between the date of execution of the will and the death of the testator, the Will shall be rendered invalid nor there is anything obligatory for the testator to mention the name of the permissive occupier, if any, in the land which is going to be bequeathed.

[21] As the court is of the view that for fair ends of justice the plaintiff should be given a scope to adduce a further evidence for proving the will properly by remanding the matter, the question of limitation and non-joinder of parties as raised by the learned counsel, Mr. Datta for the respondents are kept open for decision by the learned trial court.

[22] In view of the above discussions, the appeal is allowed. The judgments of the learned trial court and the learned first appellate court and the related decrees are set aside. The matter is remanded to the learned trial court with the following directions:

> (i) The learned trial court will give a scope to the plaintiff, not exceeding two successive dates for examining any other witness by the plaintiff only with reference to proving the will.
>
> (ii) Thereafter, the learned trial court will give a further scope to the contesting defendants not more than two successive dates for adducing further rebuttal evidence on their part in this regard. The learned trial court will thereafter hear the argument of both the sides and pronounce the judgment on all issues.

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As already stated that the defendants are also defending their case by incurring expenses since filing of the suit, a cost of Rs.10,000/- is imposed upon the plaintiff to be paid to the contesting defendants as condition precedent. Unless the same is paid, the learned trial court will not allow the plaintiff to adduce any further evidence and in that case, there will be also no question for providing opportunity to the defendants to produce their further evidence, rather straightway the learned trial court will pronounce

the judgment on all issues after hearing the argument of both the sides.

With such observations, the second appeal is accordingly disposed of on contest.

Send down the LCRs forthwith with copy of this judgment and order.

Pending application(s), if any, also stands disposed of.

JUDGE

HIGH COURT OF TRIPURA
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