

GAHC010095772006



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

Case No. : Intest.Cas./1/2006

DAMAYANTI BORA
D/O LATE NALIA BORA, VILL-BALIKATIA, MOUZA-BALIKATIA, MOUZA-
ALITANGANI, PS-JURIA, DIST-NAGAON, ASSAM.

VERSUS

NEELAMANI BORA and ORS.
W/O JOGEN BORA, VILL-NA-SATRA KAHUATOLI GAON, PO-RAIDINGIA
AIBETI, DIST-NAGAON, ASSAM.

2:2. GAHITI BARDOLOI HAZARIKA

F/O LATE HEMEN BARDOLOIHAZARIKA
VILL-BHATBORI
MOUZA-BARAPUJIA
PS-RAHA
DIST-NAGAON
ASSAM.

3:3. SMTI. KANAKLATA DEKABORA

W/O PRASANNA DEKA
VILL-MADHATAYEE BARUAH CHOWK
PS-KALIABOR
DIST-NAGAON
ASSAM.

4:4. RENU BORA HAZARIKA

W/O JADAB HAZARIKA
VILL-BARUAH CHOWK
PS-KALIABOR

DIST-NAGAON
ASSAM.

5:5. SMTI. BHOGESWARI BORA

W/O LATE NALIA BORA.

6:6. SMTI. LILI BORA

D/O LATE NALIA BORA.

7:7. SMTI. LILAWATI BORA

D/O LATE NALIA BORA.

8:8. SMTI. LABANYA BORA

D/O LATE NALIA BORA.

9:9. SMTI. LABANYA BORA

D/O LATE NALIA BORA.

10:10. SMTI. AJANTA BORA

D/O LATE NALIA BORA.

11:11. AKAN SAIKIA

S/O BHURAM CHUTIA
HUSBAND OF LT. PUTU BORA
ALL ARE RESIDENT OF VILL-TINIKURIA GARCHAGI
PO-BAHADUR CHOWK
DIST-LAKHIMPUR
ASSAM

Advocate for the Petitioner : MRS.S BORA

Advocate for the Respondent : MR.H KASHYAP

PRESENT

THE HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellant : Ms. S. Bora,
Advocate.

For the Respondents: Mr. A.D. Choudhury,
Advocate.

Date of Hearing: 27.02.2024.

Date of Judgment: 08.05.2024.

JUDGMENT AND ORDER (CAV)

Heard Ms. S. Bora, learned Counsel appearing for the appellant as well as Mr. A.D. Choudhury, learned counsel representing the respondents.

2. This is an appeal under Section 299 of the Indian Succession Act, 1925 whereby the judgment and order dated 15.09.2005 passed by the learned Addl. District Judge, Nagaon in T.S. (P) Case No. 30/2004 is under challenge.

3. On 09.05.2000, late Nalia Bora executed a Will bequeathing certain landed properties in favour of his daughter Damayanti Bora, the appellant. After the death of Nalia Bora, Damayanti Bora filed an application before the court below seeking a Probate.

4. Notices were issued to other legal heirs of late Nalia Bora. He had other daughters and a pre-deceased son who had left behind two wives and children.

5. Smti. Renu Bora, one of the daughters of late Nalia Bora, contested the application filed by Damayanti Bora. She has claimed that her father was suffering from cancer and therefore, he did not have a sound mind at the time of execution of the Will.

6. Smti. Renu Bora further submitted that late Rupam Bora was the only son of Nalia Bora. Even then, his heirs were overlooked while executing the Will and this fact is sufficient to create a doubt about the authenticity of the Will executed by Nalia

Bora.

7. Since Smti. Renu Bora has contested the Will of Damayanti Bora, the petition was converted to a Title Suit.

8. The court below framed the following issues:

- 1) Whether the suit is maintainable in the present form?
- 2) Whether the suit is bad for non-joinder of necessary parties?
- 3) Whether the Will is genuine and executed by the testator in sound health and mind?
- 4) Whether the suit is bad for suppression of material facts?
- 5) Whether Adhani Bora is daughter of Nalia Bora?
- 6) Whether the suit property is properly valued?
- 7) Whether letter of administration can be issued in favour of the plaintiff as prayed for?
- 8) To what relief, if any the parties are entitled to?

9. During the hearing of the case, Damayanti Bora examined herself along with two other witnesses, namely- Khageswar Medhi and Ramananda Debogowami. Similarly, Renu Bora examined herself along with another witness namely- Dr. Hemanta Phukan.

10. On the basis of the evidence on record, the trial court held that there was no evidence to show that late Nalia Bora disliked his only son, deceased Rupam Bora and that is why he was overlooked while bequeathing property in favour of his daughter Damayanti Bora. The trial court held that the Will was not genuine as the testator Nalia Bora did not have a sound mind at the time of execution of the Will.

11. I have considered the submissions made by the learned counsel of both sides.

12. The only point for determination in this appeal, is as to whether the Will (Ext.1) is a genuine Will or not? The learned trial court has framed the Issue No.3 to decide this

question. Therefore, I shall take up Issue No.3 first, before taking up rest of the issues.

ISSUE NO.3

13. At this stage, a brief visit to Section 63 of the Indian Succession Act, 1925 and Section 68 of Indian Evidence Act, 1872 would be fruitful. They read as under:-

“Section 63 of the Indian Succession Act, 1925

Execution of unprivileged wills Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) 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 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 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.

Section 68 of Indian Evidence Act 1872

Proof of Execution of document required by law to be attested 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: xxx”

14. In Meena Pradhan & Ors.—~~Vs~~ Kamla Pradhan & Anr., while disposing of Civil Appeal No.3351 of 2014, the Supreme Court has held as under:

“10. Relying on H. Venkatachala Iyengar v. B.N. Thimmajamma, 1959 Supp (1) SCR 426 (3Judge Bench), Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 (3-Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91(2Judge Bench) Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar

Singh, (2009) 4 SCC 780 (3Judge Bench) and Shivakumar v. Sharanabasappa, (2021) 11 SCC 277 (3Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

- i. The court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him;
- ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.
- iii. A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:
 - (a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a Will;
 - (b) It is mandatory to get it attested by two or more witnesses; though no particular form of attestation is necessary;
 - (c) Each of the attesting witnesses must have seen the testator sign or affix his mark to 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 acknowledgment of such signatures;
 - (d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;
- iv. For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;
- v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;
- vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;
- vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;
 - viii. Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.
- ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature

and effect of the dispositions in the Will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his own free Will;

x. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

xi. Suspicious circumstances must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind'¹. Whether a particular feature would qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc."

15. Reverting to the case in hand, Damayanti Bora has examined Khageswar Medhi, the writer of the Will and Ramananda Debogoswami, the attesting witness of the Will. It may be stated that the said Will i.e. Ext.1 was a registered Will.

16. Khageswar Medhi has stated that the mother of Damayanti Bora had come to his office and asked him to write one Will. On that day at about 2 P.M., the Sub-Registrar had gone to the house of Damayanti Bora and this witness also accompanied him. According to Kageswar Medhi, late Nalia Bora had received them at the entry gate of his house. Nalia Bora had taken the Sub-Registrar and this witness into his house. This witness has stated that he wrote the Will and read over its contents to Nalia Bora. The witness has disclosed that Nalia Bora had agreed that the Will was written according to his wish and thereafter, he put his thumb impression upon the Will. The thump impression was taken by this witness.

17. The witness Ramananda Debogoswami has stated in his evidence that he had put his signature i.e. Ext.1 (4) in the Will as a witness. This witness has stated that on that day, Nalia Bora had come to his house and told him that he had sent someone for bringing the Sub-Registrar so that he can execute a Will and invited this witness to come to his house. Ramananda Debogoswami has further stated that when the Sub-Registrar reached the house of Nalia Bora, he had come to his house and in front of

him Nalia Bora had put his thumb impression upon the Will and this witness also put his signature.

18. The respondent(s) had examined Dr. Hemanta Phukan, who was the Resident Doctor at Gohain Nursing Home at Nagaon. He has stated in his evidence that Nalia Bora was admitted in that Nursing Home. According to this witness, on 24.04.2000, Nalia Bora was operated upon and on 05.05.2000, he was discharged. The consent for surgical operation upon Nalia Bora was given by Damayanti Bora. Dr. Hemanta Phukan stated that Nalia Bora was suffering from stomach cancer.

19. The witnesses examined by Damayanti Bora and the respondent Smti. Renu Bora were cross-examined.

20. There is no dispute that on 09.05.2000, late Nalia Bora had executed the Will. It was written and attested by Kageswar Medhi and Ramananda Debogswami. There is also no dispute that late Nalia Bora was suffering from stomach cancer and on 05.05.2000, he was discharged from hospital after a surgical operation.

21. Smti. Renu Bora has expressed doubt about the mental health of Nalia Bora because he had overlooked his only deceased son Rupam Bora while bequeathing his properties in favour of his daughter Damayanti Bora.

22. In *Meena Pradhan* (supra), the Supreme Court has held that- any circumstance raising suspicion, legitimate in nature would qualify as a suspicious circumstance, for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc.

23. Here, in this case, the respondent has suspected the authenticity of the Will on the allegation that Smti. Damayanti Bora has taken an active role to have the Will of late Nalia Bora executed in her favour.

24. I find that the evidence on record does not support the suspicion of the respondent Smti. Renu Bora. The witnesses Kageswar Medhi and Ramananda

Debogoswami have been extensively cross-examined by Smti. Renu Bora. There is nothing in the cross-examination to disbelieve the witnesses.

25. It is true that on 05.05.2000, late Nalia Boras was discharged from Nursing Home after a surgical operation. But there is no evidence in this case to show that late Nalia Bora had a feeble mind on the day of execution of the Will. Nalia Bora had called the Sub-Registrar to his house and executed the Will and got the same registered also. Nalia Bora was suffering from cancer and that fact, *per se*, does not mean that he did not have a sound mind to execute a Will. There is no evidence to prove that Nalia Bora had a feeble mind at time of execution of Will.

26. I find that the learned trial court had erroneously oriented itself and arrived at an incorrect finding. I, therefore, hold that the Will i.e. Ext.1 which was executed by late Nalia Bora in favour of Damayanti Bora is a valid and genuine Will. I answer this issue in affirmative.

ISSUE NO.1

27. For the decision arrived at Issue No.3, this issue is answered in affirmative.

ISSUE NO.2

28. This issue was framed at the behest of the respondent. She claimed that the children of Putumai Bora, another daughter of late Nalia Bora were not impleaded in this case nor the legal heirs of Rupam Bora, the deceased son of Nalia Bora were impleaded in this case.

29. In a civil suit, when a defendant points out that some necessary persons are not impleaded as defendants, it is the duty of the trial court to decide that issue and to ask the plaintiff to implead those persons as defendants. If the plaintiff fails to comply with the order of the court, then, the suit becomes bad for non-joinder of necessary parties.

30. In the case in hand, the trial court did not decide that issue and no such direction was given by the trial court to the plaintiff though the issue of non-joinder

was raised in the pleadings of the Renu Bora. Even then, the trial court has held that the suit of the plaintiff Damayanti Bora is bad for non-joinder of necessary parties. Initially, by failing to direct the plaintiff to implead some other persons as pointed out by the defendant in the pleadings, as defendants, the trial court technically did not agree with the defendant. But subsequently, the trial court agreed with the defendant that the suit is bad for non-joinder of necessary parties. The trial court cannot have two different views on the same issue.

31. Here, in this case, the respondent Smti. Renu Bora though pointed out that late Nalia Bora had some other heirs, who should have been impleaded as defendants in the suit, has not given any reason as to why they should have been impleaded as defendants in the suit.

32. I, therefore, hold that the persons, whom the respondent wanted to be impleaded as necessary parties, are not necessary parties in the suit. This issue is answered in negative.

ISSUE NO.4

33. This issue was also framed at the behest of the respondent. During the trial of the case, the respondent did not prove that the case of the plaintiff is bad for suppression of material fact. Therefore, this issue is answered in negative.

ISSUE NO.5

34. The respondent had claimed that Adhani Bora is the daughter of late Nalia Bora. But the respondent did not adduce any evidence to prove that fact. Therefore, this issue is answered in negative.

ISSUE NO.6

35. The issue of valuation of a suit in a civil court is a matter between the court and the plaintiff. The defendant has nothing to say on that issue. This is the settled position of law. The trial court should have decided this issue at the time of filing of the suit. It was not done by the trial court. Therefore, I hereby, hold that the suit was properly valued. This issue is answered in affirmative.

ISSUE NO.7

36. While deciding the Issue No.3, this Court has held that the Will dated 09.05.2000 executed by late Nalia Bora in favour of his daughter Damayanti Bora, is a genuine one. Therefore, Damayanti Bora deserves to be issued the letter of administration.

ISSUE NO.8

37. In view of the decisions arrived at in the foregoing issues, this issue is answered in favour of the appellant. The Will dated 09.05.2000 executed by late Nalia Bora in favour of his daughter Damayanti Bora, deserves to be probated.

O R D E R

38. The appeal is allowed. The impugned judgment and order dated 15.09.2005 passed by the learned Addl. District Judge, Nagaon in T.S. (P) Case No. 30/2004, is set aside.

39. The suit of the appellant is decreed. Probate shall be issued in favour of the appellant Damayanti Bora. Prepare the decree accordingly.

Send back the LCR.

JUDGE

Comparing Assistant