



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

PRINCIPAL SEAT AT GUWAHATI

Case No. Intest.Cas./6/2017

1. Smti Minu Das,
W/o Late Manmohan Das,
2. Miss Dimpal Das,
D/o Late Manmohan Das,
3. Miss Dipika Das,
D/o Late Manmohan Das,
All are R/o Vill. Karertal, P.O. Bhatkuchi,
Mouza Jania, P.S. Barpeta,
Dist. Barpeta, Assam.

.....Appellants

-Versus-

1. Smti Bulu Das,
W/o Late Mantu Das,
2. Miss Riki Das,
D/o Late Mantu Das,
3. Miss Karabi Das,
D/o Late Mantu Das,
All are R/o vill. Karertal, P.O. Bhatkuchi,
P.S. Barpeta, Dist. Barpeta,
Assam, PIN 781301.

.....Respondents

- B E F O R E -

HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the appellants : Mr. P. Upadhyay.

Advocate for the respondents : Mr. A. Ikbal.

Date of hearing : **10.09.2024**

Date of judgment : **23.09.2024**

JUDGMENT & ORDER (CAV)

Heard Mr. P. Upadhyay, learned counsel for the appellants and Mr. A. Ikbal, learned counsel for the respondents.

2. This appeal, under Section 299 of the Indian Succession Act, 1925, is directed against the judgment and order, dated 27.06.2017, passed by the learned Additional District Judge, Barpeta, in Title Suit (P) Case No. 2/2016.

3. It is to be noted here that vide impugned judgment and order, dated 27.06.2017, the learned Additional District Judge, Barpeta ('trial Court', for short) has dismissed the application filed by the appellants for grant of Letter of Administration in respect of the will executed by deceased Phulobala Das, on 01.07.2012, in favour of the appellants.

4. The background facts, leading to filing of the present appeal, are briefly stated as under:

"The appellants and the respondents are all residents of village Karertal, under Barpeta P.S., in the Barpeta district and

are the relatives of the deceased Phulobala Das, who died on 05.07.2012, on account of her illness. During her lifetime, she lived with the appellants for last 20 years and the appellants took all the necessary care and nursing till her death. The appellant No. 1 is the daughter-in-law and other appellants are grand-daughters of deceased Phulobala Das. During her lifetime, Late Phulobala Das executed a will on 01.07.2012, in favour of the appellants in presence of witnesses with her full knowledge and consent without being influenced by anybody. In the said will, Late Phulobala Das bequeathed the landed properties owned and possessed by her mentioned in the schedule of the plaint, in favour of the appellants without any force or coercion while she was in sound state of health and mind. Late Phulobala Das had three sons, namely, Late Mantu Das, Late Jitu Das @ Bimal Das and Sri Manmohan Das. Jitu Das @ Bimal Das died unmarried and the present respondents/opposite parties are wife and daughters of Late Mantu Das.

After the death of Late Phulobala Das, the appellants filed a suit, being Title Suit (P) Case No. 2/2016, before the Court of learned District Judge, Barpeta, for granting letter of administration in respect of the will by annexing the will with the plaint as Annexure-1. Upon the said plaint, the District Judge, Barpeta registered the case, being Title Suit (P) Case No. 2/2016, and thereafter, made over the same to the Court of learned Additional District Judge, Barpeta. Thereafter, the learned Additional District Judge, Barpeta issued notice to the respondents, on receipt of which the respondents entered

appearance before the learned trial Court and filed their written objection stating that there was no cause of action and it was also denied that during the lifetime of Late Phulobala Das, she had executed a will on 01.07.2012, in favour of the appellants in presence of witnesses with her sound body and mind without the influence of anybody in respect of the properties mentioned in the schedule of the will, and that the same is false, concocted and misleading, and that during the lifetime, Late Phulobala Das never made any gift or transfer of other properties except the will, is also false and misleading and the fact is that the respondents are daughter-in-law and grandchild of Late Phulobala Das and they are also legal heirs of Late Phulobala Das and during her lifetime, Late Phulobala Das executed Title Suit No. 33/1983, against the defendants Surja Das and others, in respect of properties mentioned in the schedule of the plaint, but the Court was pleased to dismiss the suit on contest. However, on appeal, the learned Civil Judge, Barpeta decreed the suit in favour of Late Phulobala Das. Thereafter, Surja Das and others preferred a second appeal before this Court and the said appeal was dismissed by this Court. But, due to her illness, Late Phulobala Das could not initiate the execution proceeding and ultimately, she died on 05.07.2012, leaving behind her son Sri Manmohan Das, on the death of Mantu Das, his legal heirs, Smti. Bulu Das, daughters Smti. Riki Das and Smti. Karabi Das.

After the death of Late Phulobala Das, Manmohan Das started an execution proceeding without the knowledge of the respondents with a view to deprive them from their legitimate

share in the schedule property and coming to know about the said execution proceeding, the respondents/opposite parties also preferred an application under Section 47 of the CPC in Title Ex. Case No. 5/2013, with a prayer to add them party as decree holders, which was allowed by the Court. In the said execution proceeding, Manmohan Das did not mention about the execution of any will by deceased Phulobala Das in favour of his wife and children.

It is also stated that Late Phulobala Das was suffering from various old age ailments. She was hospitalized from time to time. On 08.06.2012, her health condition was deteriorated following which she was admitted at Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta and after prolonged treatment and finding no hope for her recovery, she was taken back to her residence and she was not in a position to eat and drink and she lived only on the support of medicine and on such count, she was not in sound health and mind to execute any will in favour of the appellants. She was released from hospital on 27.06.2012 and died on 05.07.2012. Therefore, at the time of execution of the will on 01.07.2012, she was not in a position of sound health and mind and that the said will was nothing but the outcome of fraud and coercion and executed by taking undue advantage of fiduciary relationship of the appellants with Late Phulobala Das.

Thereafter, upon the said pleadings, the learned trial Court had framed the following issues:

1. Whether deceased testator Phulobala Das during her life time on 01.07.2012 executed one will in favour of the appellants/petitioners of the case?
2. Whether the will was executed with undue influence of the petitioners by deceased testator Phulobala Das?
3. Whether at the time of execution of will deceased Phulobala Das was not in sound health and mind?
4. Whether the appellants/petitioners taking the undue advantage of the situation and circumstances prevailing at that time fraudulently obtained the will?
5. To what relief or reliefs the parties are entitled to?

Thereafter, the learned trial Court after hearing the learned Advocates of both the parties and also considering the evidence brought on record, held that execution of the will by the testator appears to be clouded with suspicion under such fluid circumstances, it is well nigh impossible to execute a will in sound state of health and mind when the very person who executed the will is counting her days and expired after four days of the execution of the will (Ext.1) and thereafter, dismissed the petition."

5. Being highly aggrieved, the appellants have preferred this appeal on the following grounds:

- (i) That, the learned trial Court had arrived at an erroneous finding on wrong appreciation of evidence and interpretation of law.

- (ii) That, the learned trial Court had failed to record the finding on all the five issues as required under Order 20 Rule 5 of the CPC and having not done so, the impugned judgment and order dated 27.06.2017, is bad and liable to be set aside.
- (iii) That, the appellants proved the execution of the will by the testator in their favour with sound mind and out of her free will and by examining two witnesses, P.W.3 and P.W.5, being the attesting witnesses to the will and P.W.5, the scribe of the will, and they had clearly stated that the will was executed by the testator under sound mind and with her own consent and without any undue influence, and the evidence of P.W.3, P.W.4 and P.W.5 corroborated each other and as such, there is no ground to discard their evidence.
- (iv) That, the learned trial Court arrived at an erroneous finding that the will was not executed by the testator on her sound health and mind, merely because she died after four days of the execution of the will, in spite of the evidence being available to the effect that the testator in her disposing state of mind and out of her free will, had executed the will and nothing is brought on record by the respondents that the will was obtained by the appellants by fraud and undue influence and coercion.
- (v) That, the learned trial Court had acted mechanically and laid importance on irrelevant consideration while passing the impugned judgment and order, which caused miscarriage of justice and therefore, it is contended to set it aside.

6. Mr. P. Upadhyay, learned counsel for the appellant, while reiterating the grounds mentioned herein above, has also submitted that what the law requires is the sound state of mind, not the sound state of health, but the learned the trial Court had laid much emphasis on the sound health. Mr. Upadhyay also submits that the learned trial Court had recorded the finding only in respect of issue No. 3 and the other issues were not discussed and no finding had been recorded which is contrary to the provision of law. It is the further submission of Mr. Upadhyay that execution of the will stands established from the evidence of P.W.3 and P.W.4, who are the attesting witnesses and P.W.5, who is the scribe of the will and that there is ample corroboration in their version and there is no point for discarding the same and as such, the finding so recorded by the learned trial Court is erroneous and therefore, it is contended set it aside. Mr. Upadhyay has also referred the following case laws in support of his submission:

- (i) Beni Chand (Since Dead) now by L. Rs vs. Smt. Kamla Kunwar and Ors., reported in AIR 1977 SC 63.**
- (ii) Kochu Thresia alias Vimala vs. Mr. K.G. Joseph and Ors., in A.S. No. 263/2001.**
- (iii) Smt. Indu Bala Bose and Ors. vs. Manindra Chandra Bose and Anr., reported in AIR 1982 SC 133.**
- (iv) V. Velayudhan Nair vs. Kallyyanikutty Amma, reported in 2006 1 KLT 884.**

- (v) Ganpatrao Khandero Vijaykar vs. Vasantrao Ganpatrao Vijaykar, reported in (1932) AIR(Bombay) 588.
- (vi) Gordhandas Nathalal Patel vs. Bai Suraj, reported in (1921) AIR(Bombay) 193.
- (vii) Januava Dasi wife of L. Kunj Das Bairagin vs. Hari Dasi, reported in (1957) All LJ 667.
- (viii) Pappoo vs. Kuruvilla, reported in 1994 2 KLT 278.
- (ix) Chhanga Singh Indar Singh vs. Dharam Singh and Ors., reported in AIR 1965 Punjab 204.
- (x) Naresh Charan Das Gupta vs. Paresh Charan Das Gupta and Anr., reported in AIR 1955 SC 363.
- (xi) Daulat Ram and Ors. vs. Sodha and Ors., reported in (2005) 1 SCC 40.
- (xii) Sridevi and Ors. vs. Jayaraja Shetty and Ors, reported in (2005) 2 SCC 784.
- (xiii) Vrindavanibai Sambhaji Mane vs. Ramchandra Vithal Ganeshkar and Ors., reported in (1995) 5 SCC 215.

7. Per contra, Mr. A. Iqbal, learned counsel for the respondents has supported the impugned judgment and order. Mr. Iqbal submits that while the will was allegedly executed on 01.07.2012, the testatrix died on 05.07.2012, just after five days and she was not in a position to execute the will as a few days back, she was admitted in hospital and thereafter, taken back to her home having found no chance of recovery and her signature is also not legible and also there is

contradiction in the version of P.W.1 and P.W.2 regarding calling the witnesses and scribe and all the witnesses are from the same family and the stamp paper was purchased on 28.06.2012, after one day when she was discharged from the hospital and she was not in a sound state of mind and therefore, Mr. Ikbal has contended to dismiss the appeal.

8. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the memo of appeal and the grounds mentioned therein and also gone through the record received from the learned trial Court as well as the case laws referred by Mr. Upadhyay, learned counsel for the appellants.

9. Before a discussion is directed into the submissions made by learned Advocates of both sides, it would be apposite to discuss the relevant provision of law and also the decisions of Hon'ble Supreme Court presently holding the field.

10. Section 63 of the Indian Succession Act, 1925 provides for execution of unprivileged wills which read as under:-

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”

8. Thus, a bare reading of the abovementioned provisions would show that the requirements enshrined under Section 63 of the Succession Act have to be categorially complied with for the execution of the Will to be proven in terms of Section 68 of the Evidence Act.

9. A Will is an instrument of testamentary disposition of property. It is a legally acknowledged mode of bequeathing a testator's property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. It speaks from the death of the testator. Since the testator/testatrix, at the time of testing

the document for its validity, would not be available for deposing as to the circumstances in which the Will came to be executed.

11. In the case of Meena Pradhan and Ors. Vs. Kamla Pradha and Anr. Civil Appeal No.3351 of 2014 (Arising out of SLP(C) NO.17115/2010, Hon'ble Supreme Court, relying upon some of its earlier decisions in H. Venkatachala Iyengar v. B.N. Thimmajamma, 1959 Supp (1) SCR 426 (3 Judge Bench), Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 (3 Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91 (2 Judge Bench) Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, (2009) 4 SCC 780 (3 Judge Bench) and Shivakumar v. Sharanabasappa, (2021) 11 SCC 277 (3 Judge Bench), had deduced/inferred 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 etc. 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'. 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.

11.1. It is further held that in short, apart from statutory compliance, broadly it has to be proved that:-

- (a) the testator signed the Will out of his own free Will,
- (b) at the time of execution he had a sound state of mind,
- (c) he was aware of the nature and effect thereof and
- (d) the Will was not executed under any suspicious circumstances.

12. Now, adverting to the fact herein this case, I find that the appellant No. 1, Amti Minu Das had examined herself as P.W.1, and Dimpal Das as P.W.2, Utpaljit Das P.W.3 and Sanjit Das as P.W.4, who are the attesting witnesses to the will and the scribe Thakur Medhi as P.W.5. Further, it appears that from the evidence of P.W.1, P.W.2, P.W.3 and P.W.4, that the testatrix, Late Phulobala Das died on 05.07.2012, and she had executed the last will, which is marked as Ext.1, on 01.07.2012 in favour of the appellants and as per the said will (Ext.1), Late Phulobala Das bequeathed her landed property, specifically described in the schedule in favour of the appellants and they also testified that at the time of execution of the said will (Ext.1),

Late Phulobala Das was in sound state of mind and health. It also appears that the testatrix had executed the will in favour of the appellant No. 1, Minu Das, because of her self-less service, care and nursing for last 20 years to her.

13. Further, it appears that the respondents are also the legal heirs of Late Phulobala Das, who had three sons, namely, Late Mantu Das, Late Jitu Das @ Bimal Das and Sri Manmohan Das. Jitu Das @ Bimal Das pre-deceased Late Phulobala Das and he was unmarried and the testatrix Late Phulobala Das left behind her son Sri Manmohan Das, his wife Minu Das and two daughters Smti. Dimpal Das and Smti. Dipika Das as well as the respondents, Smti. Bulu Das, her daughters Smti. Riki Das and Smti. Karabi Das, as her legal heirs.

14. It also appears from the written statement filed by respondent No. 1 Smti. Bulu Das, that during the lifetime of Late Phulobala Das, she had executed one title suit, being Title Suit No. 33/1983, against the defendants Surja Das and others, in respect of properties mentioned in the schedule of the plaint, which was dismissed on contest after hearing the parties. Against the said dismissal, an appeal was preferred before the learned Civil Judge, Barpeta, wherein the suit was decreed in favour of Late Phulobala Das and thereafter, a second appeal was preferred before this Court, which came to be dismissed due to lack of merit.

15. Further, it appears that Late Phulobala Das, during her lifetime, could not file execution proceeding. But, after her death, Manmohan Das started an execution proceeding without the knowledge of the respondents. Then, having come to know about the said execution

proceeding, the respondents preferred an application before the learned executing Court, which was allowed and there was no mention about the execution of will by the testatrix in the said proceeding. This appears to be one of the suspicious circumstances surrounding execution of the will.

16. Further, it appears that the testatrix, Late Phulobala Das was suffering from various old age ailments for two years and she was hospitalized on 08.06.2012 and she expired on 05.07.2012, after her release from Hospital on 27.06.2012. It is also apparent from the evidence on the record that during that period, she was not in a position to eat and drink and was only on the support of medicine and was not in sound health and mind to execute the will (Ext.1) on 01.07.2012. It is the pleaded case of the respondents that having seen no chance of recovery, she was released from the Hospital on 27.06.2012 and the will was executed on 01.07.2012, after obtaining the stamp paper for execution of the will on 28.06.2012. This aspect is highlighted by Mr. Iqbal, learned counsel for the respondents at the time of hearing, referring to the medical certificate, dated 12.09.2013, of the testatrix, which was exhibited as Ext. B. It is another suspicious circumstance surrounding execution of will by the testatrix.

17. Further, it appears from the evidence of the witnesses of the appellants that they gave different versions as to who called the attesting witnesses to the house of the appellants. While P.W.1 Smti. Minu Das testified that the witnesses were called to her house by her elder daughter Smti. Dimpal Das, but Dimpal Das in her cross-examination, stated that the witnesses were called by her mother

Smti. Minu Das. It also appears that in cross-examination, P.W.4, Sri Sanjit Das stated that he was called by one Tutu to the house of Smti. Minu Das. Thus taking part in execution of the will by the appellants herein, specially P.W.1 and 2, under which they received substantial benefit and unjust disposition of the property are also the suspicious circumstances as held by the Hon'ble Supreme Court in the case of **Meena Pradhan and Ors.(supra)**.

18. It further appears that all the witnesses of the appellants gave differed versions regarding the status of health of Late Phulobala Das and despite the only son of Late Phulobala Das being alive, Ext.1 was executed in favour of the appellant No. 1, Smti. Minu Das and in the name of her daughters appellant No. 2, Smti. Dimpal Das and appellant No. 3, Smti. Dipika Das. But, it appears that the title execution suit was filed by her husband Manmohan Das, in which the testatrix got a decree in the learned Civil Court and it appears from the evidence of P.W.3, Sri Utpaljit Das that at the time of execution of the will (Ext.1), Late Phulobala Das was physically very weak, though he stated that she was in sound health and after execution of the will, she was again taken to the Hospital and died after two days after admission in the hospital and he also testified having affixed a signature by her son Manmohan Das, but Manmohan Das is not an attesting witness to the will.

19. It is well settled that whenever suspicious circumstance surrounds execution of wills, it is the duty of the propounder to remove the same. But, in the case in hand, from the submission of the learned counsel for the appellants and also from the evidence

available on the record of the learned trial Court, this Court is unable to derive its satisfaction that the appellants, the propounders herein have succeeded in discharging its burden of removing the suspicious circumstance.

20. In that view of the matter, this court is unable to record concurrence with the submission of Mr. P. Upadhyay, learned counsel for the appellants that the learned trial Court had committed any illegality or infirmity in dismissing the petition filed by the appellants for granting letter of administration in respect of the last will allegedly executed by deceased Phulobala Das. I have also gone through the decisions referred by Mr. Upadhaya, learned counsel for the appellants. But, in view of the above discussion and finding, advertent to those decisions are found to be not necessary to decide this issues raised in this appeal.

21. But, it appears that to some extent, there is substance in the submission of Mr. Upadhyay, learned counsel for the appellants that the learned trial Court having framed as many as five issues to be decided, had recorded its finding only in respect of issue No. 3. Order 20 Rule 5 of the CPC provides that finding or decision has to be recorded with reasons thereupon on each separate issue unless finding upon one or more issues is sufficient for decision of the suit.

22. However, it appears that the issue No. 3 is a vital issue in deciding the suit and is sufficient for a decision in the suit and as such, the finding of the learned trial Court on issue No. 3 only cannot be said to be erroneous or illegal. There is no prospect of improvement of

the case even if it is remanded back to the learned trial court for a fresh decision, which would only be waste of judicial time.

23. In the result, I find no merit in this appeal and accordingly, the same stands dismissed. Send down the record of the learned trial Court along with a copy of this judgment and order. In the given facts and circumstances, it is provided that the parties shall bear their own cost.

J U D G E

Comparing Assistant