

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.57 of 2006

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Upendra Kumar Singh son of Late Yadu Nandan Singh, resident of village-Chipura, P.S. Phulwari Sharif at present P.S. Gauri Chak, District-Patna and presently residing in Mohalla-Chak Musallahpur, P.S. Kadamkuan, District-Patna.

... .. Appellant/s

Versus

1. The Estate of Amiya Kumar Dutta
2. Smt. Jhuna Bose, resident of Mohalla Chak Musallahpur, P.S. Kadamkuan, P.O. Mahendru, District-Patna

... .. Respondent/s

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Appearance :

For the Appellant : Mr. Mayank Rukhaiyar, Advocate
For the Respondents : Mr. Shailendra Kumar Singh, Advocate

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

C.A.V. JUDGMENT

Date : 15-03-2019

The present Appeal under Section 29 of the India Succession Act has been preferred against the judgement and order dated 18.01.2006 passed in Probate Case No. 108 of 2004 (filed on 28.07.2004) by the Additional District and Session Judge-XII, Patna, whereby and whereunder the learned Court has rejected the Probate application filed on behalf of the petitioner Upendra Kumar Singh for a Probate of the Will dated 25.06.1989 in respect of the property of Late Amiya Kumar Datta detailed in schedule I and II.

2. The brief facts from which the present appeal has emanated is that one Durga Nath Dutta and his son Amiya Kumar Dutta, were members of a Joint Hindu Family. A



property having an area of 4 katha bearing plot No. 67 and 97, Khata No. 20, Tauzi No. 27 and Mauza Mushallahpur, P.S. Pirbahore, District-Patna (Schedule-I) was purchased by the wife of Durga Nath Dutta, namely, Sneh Lata Dutta by means of a registered sale deed 25.02.1942 upon which a house was constructed. After her death the name of Amiya Kumar Dutta and his wife Asha Rani Dutta were mutated in the Patna Municipal Corporation. The couple aforementioned had no issue and the wife Asha Rani Dutta died in February, 1987.

3. As the story runs, Amiya Kumar Dutta treated the petitioner as his son and he took care of him till his death on 01.02.1997.

4. The further case of the Probate petitioner Upendra Kumar Singh, is that Amiya Kumar Dutta has executed a Will dated 25.06.1989 in sound state of mind and body in favour of the petitioner in his own handwriting and it was attested by witnesses, namely, Subhas Chandra Aikat, Ajay Kumar Bose and Ms. Kalpana Roy, who are said to have attested the Will in his presence. The Probate petitioner was appointed the executor of the Will and has been indicated in the Will as a major beneficiary as the aforementioned house in question has been willed in his favour. The Will which has been



sought to be probated is said to be the last Will of the testator Amiya Kumar Dutta and in the said Will, it has also been indicated that the testator got some deposit in the bank and he was also receiving pension. The said amount has been detailed in Schedule II and has been given in favour of and to Ram Krishna Mission Ashram. The names of certain other relatives namely, Amit Bose and Lovely Bose, nephew and niece of the testator have also been mentioned in the Will. In the aforesaid Will, it has also been indicated that the Amit Bose is to operate the Bank Account but his name is only for the said purpose and the money in the account belongs to Amiya Kumar Dutta. “The whole money is mine and my nephew Sri Amit Bose has no interest in it to facilitate operation his name is jointly put in there in this account.”

5. Soon after the original Will along with the death certificate was brought on record, notices were issued to the near relatives and one Neelima Bose received notice on behalf of Amit Bose. A petition was filed on behalf of Amit Bose, by a near relative namely Neelima Bose giving consent to the prayer of the petitioner. The said petition had been affidavited by one Miss Neelima Bose claiming herself to be the Bua and guardian of the aforesaid Amit Bose in which she claimed that Amit Bose



is insane and of unsound mind. Another petition was also filed by the near relative namely Lovely Bose according her consent to the aforesaid Probate to be made in favour of the appellant/Probate petitioner.

6. P.W.-2 is Ajay Kumar Bose who is a signatory witness to the Will and his initial and full signature has been marked as Annexure- ½. P.W.-3 is Kalpana Roy who is a signatory of the Will and has supported the case of the petitioner and her signature has been marked as Exhibit-1/4. Another attesting witness Subhash Chandra Aikat has not been examined.

7. In support of the case, the petitioner Upendra Kumar Singh was examined as P.W.-1 and on his identification the original Will was marked as Exhibit-1. The signature of Subhash Chandra Aikat, another attesting witness, though not examined, has been marked as Ext. 1/3 as the same has been verified in course of evidence of P.W.-2.

8. Another witness referred to as D.W.-1 on behalf of O.P., namely, Miss Neelima Bose has come forth claiming to be the *Mauseri* sister of the testator. She has also supported the case of the Probate petitioner and has claimed to have given consent as the guardian of the aforesaid mentally deficient Amit



Bose on 25.02.2005. She has identified her signature on petition dated 25.05.2005 marked as Exhibit 'A'. One Sanjay Kumar Singh has also come forth to identify the signature of Lovely Bose and the signature of the said Lovely Bose has been marked as Annexure-'B' and 'B/1'. The petition signed by Lovely Bose does not bear the seal of any authority and it is only Sanjay Kumar Singh who has come forth to identify her signature.

9. It was on the basis of such documents exhibited and the oral and the documentary evidences adduced by the Probate petitioner in favour of himself for grant of Probate, that he claimed the Probate to be granted in his favour.

10. The learned Court having considered the documents and the evidences adduced on behalf of the petitioner which were both oral as well as documentary rejected the application for grant of Probate as the Court was not inspired and convinced by the same. The Court found that it was nowhere mentioned in the Will that the aforesaid Amit Bose, nephew of the testator, was insane and of unsound mind. The Court also found that though another near relative namely, Lovely Bose had filed a petition signed by herself but the said signature was not identified and attested by any authority, rather seem to have been attested by one Sanjay Kumar Singh who



was only an Advocate's Clerk. Furthermore, the suspicion of the Court was aroused by the fact that though one Neelima Bose, a retired principal, had come out to support the case of the P.W.-1, but though she claimed to be the *Mouser*i sister of the testator, her name was not mentioned in the Will nor did it find place in any capacity in the petition. It was only subsequently that she came to file a petition dated 25.02.2005, but the same was not supported by any medical certificate which could indicate that the said Amit Bose was, in fact, insane/mentally deficient. Furthermore, the learned Court also noticed discrepancies in the writing of the Will inasmuch as its ink differs from the signature which was enough to cause suspicion. It was under such circumstances and surrounding cloud of suspicion which arose in the mind of the Court and which could not be cleared by the Probate petitioner, that the Court proceeded to decline the prayer for grant of Probate of Will in favour of the petitioner and, accordingly, rejected the petition under Section 276 of the Indian Succession Act.

11. Learned counsel for the appellant submitted that the Will which was put under Probate proceeding has been refused by the Court on pure suspicion, inasmuch as the Court has proceeded to doubt the same as the ink has been found to be



at variance. Learned counsel for the appellant submitted that the learned Court had no reason to be suspicious of the handwriting, as the handwriting which appears to be different, is in fact, the certification given by the witnesses after execution of the Will. Learned counsel for the appellant categorically asserted that after two of the attesting witnesses who were also independent witnesses had been examined and had verified and supported the contents of the Will, there was no occasion for the learned Judge to reject the prayer for grant of Probate and thus the same cannot be sustained before any court of law. In this context learned counsel for the appellant submitted that in view of the statement made in paragraph No. 3 of the evidence of P.W.-2 and also the statement made by the attesting witness in paragraph No. 5 of the evidence of P.W.-5. Section 63 of the Succession Act read with Section 68 of the Evidence Act stood satisfied.

12. In support of his contention, learned counsel for the appellant has drawn the attention of this Court to Section 63(c) of the Indian Succession Act, 1925 which reads as under:-

“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 will, in the presence and by the direction of testator, or has received from the



testator a acknowledgment of his signature or mark, or of signature of such other person; and each of 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.”

13. It was further pointed out that the learned court has erroneously decided against the appellant without taking into consideration the true import of Section 68 of the Indian Evidence Act which clearly spells out as such:

“The learned Court below did not appreciate the purport of Section 68 of the Indian Evidence Act which reads as “*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.*”

14. He thus submitted that since two of the three attesting witnesses had come forth to prove the Will and its execution, the Court had clearly erred in accepting the same purely on the basis of suspicion, though, these two witnesses, namely, P.W.-2 and P.W.-3 who were surviving at the relevant point of time had indicated in their respective depositions that the Will dated 25.06.1989 has been prepared and signed in their presence by the testator.



15. Learned counsel for the appellant has also tried to explain the delay in filing the Probate application by referring to Division Bench decision of this Court in case of **Ramanand Thakur v. Parmanand Thakur {AIR 1982 Patna 87}** wherein it has been held that the “right to apply accrues every day and the cause of action for an application for Probate arises every moment so long as the will remains unprobated and, therefore, for such an application there is no period of limitation.” The Hon’ble Division Bench further held that:

“Therefore, while holding that the Article 137 of the new Limitation Act applies to any petition or application filed under any Act, we do not feel any difficulty to come to conclusion that so far as the application for grant of a probate or Letters of Administration is concerned, they are not governed by any Article of the Limitation Act.”

16. It was thus submitted by learned counsel for the appellant that the issue of limitation cannot be raised at this stage to defeat the cause of the Probate petitioner.

17. I have heard learned counsel for the appellant and perused the records of the case.

18. The Probate petitioner stated that he was the executor appointed under the will dated 25.06.1989 executed by Amiya Kumar Dutta. It was submitted that it was his last Will



executed in the presence of Subhash Chandra Aikat, Ajay Kumar Bose, and Ms. Kalpana Roy who had also attested in his present at his instance and therefore, the Will having been duly executed, the same may be probated in his favour. In the aforesaid application, it has also been stated that Ms. Lovely Bose daughter of Late Amar Chandra Bose (niece/*Bhagni*) living at B-7/3 Indralok Estate-I, Kolkata was one of the near relations and Amit Bose (Nephew), son of late Anant Nath Bose, under the guardianship of Fua Ms. Neelima Bose who was his guardian and was living at Mohalla ChakMuslapur, P.S.-Kadamkuan, District-Patna.

19. It appears from the records of the case that on notices being sent to the said Amit Bose, one Neelima Bose, daughter of Jitendra Nath Bose and Fua of the said Amit Bose had received the said notice and thereafter filed an affidavit in which she had stated that she was guardian of insane Amit Bose son of Late Anant Nath Bose. Subsequently, she had also filed a petition consenting on behalf of Amit Bose, insane son of Late Anant Nath Bose, under the guardianship of his Fua Miss Neelima Bose for grant of Probate to the petitioner. Another, application has been brought on record by one Miss Lovely Bose wherein she has stated that she has no objection to the



grant of Probate in respect of the immoveable property described in Schedule I of the Probate petition. The affidavit signed by Ms. Lovely Bose does not bear the seal and sign of any authority before whom it is said to have been verified and is an undated document and prepared in the month of October, 2004 at Kolkata. It is neither affidavited nor notarised. She has not come to Patna to appear or depose before the Court of learned District Judge, Patna. The register cover attached to the same indicates that it was sent to the Court of learned District Judge, Patna, by means of registered post.

20. Furthermore, out of the three attesting witnesses, one witness who had attested the Will has not been examined. Moreover, there is nothing on record to prove that Amit Bose was insane and there is no medical evidence in support thereof and that her Fua Miss Neelima Bose had been his guardian for all practical purposes. Learned counsel for the Probate petitioner/appellant had further submitted that there was no ground for suspicion, as two of the attesting witnesses came before this Court and had deposed in favour of the Probate petitioner, and there being no objection from any quarter, the learned court ought to have proceeded to grant Probate in favour of the petitioner. It was further submitted that both the attesting



witnesses namely, P.W.-2 Ajay Kumar Bose and P.W.-3 Kalpana Roy were independent witnesses who had in their depositions affirmed the Will and had stated that the testator had signed in their presence and therefore, the Court ought not to have proceeded to reject the application for Probate on the ground of mere suspicion, but such contentions fail to clear the cloud of suspicions for the reasons detailed hereunder.

21. I have considered the arguments advanced by the learned counsel in support of the appellant and have considered the same. The submissions advanced appear to be more than convincing but for certain serious contradictions which have emanated in the proceedings in the Court below. It appears that names of the next relatives namely Lovely Bose and Amit Bose had been referred to in the Probate petition, but after the Will was filed when it came to putting them to notice, certain methods have been brought into play which remain unanswered and can be detailed in the following manner:

- (a) So far as the consent given by the purported guardian of Amit Bose is concerned, it appears that when the Court sent the notices to him, the same was received by his Fua, namely, Neelima Bose who appeared before the Court stating that the said Amit Bose was mentally retarded and



she was the guardian and had no objection to the Will being probated in favour of the Appellant. The name of Neelima Bose, however, does not find place in the Will as a near relative nor is it known as to how she came on the scene. It further appears that the testator himself did not describe Amit Bose as being mentally deficient or he would not have written in his Will that his name was being brought in only for the purpose of facilitating (after death) the operation of his Bank account. Such discrepancy stands unexplained to this Court as no Medical Certificate has been brought on record which necessarily places a cloud over the appellant's prayer for grant of Probate.

(b) So far as the consent accorded by Lovely Bose, niece of the testator is concerned, the document brought on record is an undated application purportedly signed by her which does not appear to be notarised nor affidavited. The said application, giving no objection has been certified by one Sanjay Kumar Singh who is the Advocate's Clerk. In the considered opinion of this Court, such a document cannot be given any credence and raises suspicion in the mind of this Court regarding its creation for the purposes of



renunciation of rights of the near relatives. In this view of the matter also, this Court is not inclined to be drawn towards the genuineness of the claim of the Probate petitioner.

- (c) So far as handwriting of the Will is concerned, the attesting witness, namely, Kalpana Roy in her deposition has not stated that the Will was written in favour of Upendra Kumar Singh but has merely stated that the same was written in her presence. However, to supplement such deposition a notarised affidavit has been filed in the Court on the same date supplementing such submissions wherein she has stated that it has been written by the testator in his handwriting in her presence.

Similarly, P.W.-2 Ajay Kumar Bose has also filed his affidavit and deposed in Court stating that the testator had written the Will in his presence. However, nowhere has he averred that the nephew Amit Bose was mentally challenged or deficient which renders the story about the mental deficiency of Amit Bose rather incredible.

However, neither of the two witnesses have stated that the Testator was in a sound state of mind and health at the time of execution of the Will.



(d) The change of ink and handwriting as explained also appears unconvincing as the witnesses have merely signed mechanically.

(e) The other aspect which has drawn the attention of this Court is that in order to obtain Grant of Probate, the Appellant has also taken the “Consent” of near relatives and in his Deposition the P.W.-1 has referred to the same stating that it was not obtained by use of any pressure but was voluntarily.

22. In this context, it would be appropriate to refer to a decision reported in **A.I.R. 1972 (Cal) 283 {Sisir Kumar Chandra and another V. Sm. Monorama Chandra and others}** wherein it has been held that such Probate cannot be granted in terms of private arrangement between parties. The extract of the aforesaid judgement is quoted hereinbelow:

“A Court of probate is a Court of conscience which is not to be influenced by private arrangements of the parties. Either it grants probate to a Will or it rejects such grant. For such a Court there is no middle path for a happy compromise. The rule of law is that there can be no probate by consent. Either it is a grant or refusal. The Court has to be satisfied in each case whether the Will proposed is truly the Will of the capable testator or not. It is not concerned with any other arrangement.”



23. In the instant case also the consent of the near relatives have been brought in to support the Probate Application which was wholly uncalled for and also appears to be suspicious.

24. Having given a deep analysis of the lacunae which have surfaced in the case particularly, the depositions of the attesting witnesses and also on account of the blatant attempt by the Probate petitioner to file the “Consent” Papers of the Near Relatives, and also because of the aforesaid reasons noted by the Probate Court, I have no hesitation in declining the Prayer of Probate of the Appellant. For the foregoing reasons, the judgement and order dated 18.01.2006 passed in Probate Case No. 108 of 2004 by the Additional District and Session Judge-XII, Patna, stands affirmed.

25. The Appeal is Dismissed.

(Anjana Mishra, J)

Saif/-

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