

IN THE HIGH COURT OF JUDICATURE AT PATNA
Test Case No.8 of 2014

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In The Goods of Kavita Rani Bose, wife of Late Sudhair Ranjan Bose,
resident of Mohalla-Jai Prakash Nagar, Digha, P.O. and P.S.-Digha, District-
Patna.

And

In the matter of an application filed by Smt. Bipasa Rani Bose, wife of Sri
Muno Kumar, resident of Mohalla-Jai Prakash Nagar, near May Flower
School, House No. B-12, Digha, P.S. + P.O., Digha, District Patna.

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Appearance :

For the Petitioner : Mr. Radha Krishna Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA

C.A.V. JUDGMENT

Date : 20-02-2019

1. This petition under Section 273 read with Section
276 of the Indian Succession Act has been filed by the applicant
Smt. Bipasa Rani Bose for grant of probate of Will dated
06.07.1993 said to be executed by Late Kavita Rani Bose in
respect of her properties.

2. The applicant averred in her petition that the testatrix
Late Kavita Rani Bose executed her last Will dated 06.07.1993 in
presence of attesting witnesses, namely, Shailesh Kumar Singh and
Ram Sudisth Sinha. The testatrix was a Hindu governed by the
Dayabhag School of Hindu Law and she was a permanent resident
of Digha, P.S.-Digha Ghat, District Patna. The testatrix Late
Kavita Rani Bose was in sound state of health and mind at the time
of execution of Will dated 06.07.1993 and she voluntarily
executed the said Will fully understanding its contents without any



undue influence of anybody. Late Kavita Rani Bose died at Patna on 19.11.2005 at 10:30 P.M. leaving behind her above stated last Will. Late Kavita Rani Bose left behind her Bipasa Rani Bose (applicant), the sole executor and eldest daughter, Rachita Gupta her second daughter, Aruna Singh her third daughter and Santosh Kr. Bose her brother. The testatrix Late Kavita Rani Bose left immovable property as mentioned in Schedule- A as well as liability as mentioned in Schedule-B of the petition.

3. On filing of above stated petition, order for issuance of special citation to near relatives as well as general citation for publication in two local daily newspapers i.e. one in Hindi and one in English was passed and in pursuant thereto, the special citations to near relatives were issued and the general notice was published in local English as well as Hindi newspaper. However, near relatives, as mentioned in the application, appeared through their learned counsel by filing their separate respective vakalatnama and they also filed I.A. No. 4901 of 2017 admitting therein that late Kavita Rani Bose had executed Will dated 6.7.1993 in favour of applicant Smt. Bipasa Rani Bose in respect of the property mentioned in Schedule-A of the present petition. Furthermore, the above stated near relatives also admitted that late Kavita Rani Bose executed the Will in question in her good sense of mind and



without any pressure or coercion. The above stated near relatives further averred in their petition that the probate may be granted in favour of Smt. Bipasa Rani Bose and they have no objection, if probate is granted to Smt. Bipasa Rani Bose.

4. The petition for grant of probate has been verified by the one attesting witness, namely, Shailesh Kumar Singh and affidavit by the aforesaid attesting witness has also been filed. Apart from this, the applicant has annexed original Will dated 06.07.1993 as well as death certificate of Kavita Rani Bose. The original Will was kept in sealed cover with Joint Registrar, Judicial.

5. It is pertinent to note here that some defects were pointed out by the Stamp Reporter in the petition filed on behalf of the applicant but this court vide order dated 05.02.2015 ignored the aforesaid defects at the risk of the applicant mentioning that “the defects may be considered at appropriate stage.”

6. After appearance of near relatives of the testatrix, the applicant was directed to file examination in chief on affidavit of her witnesses, original documents with list, if any, but no examination in chief on affidavit of witnesses of applicant was filed and on the prayer of learned counsel of the applicant, this petition was posted for hearing.



7. Learned counsel appearing for the applicant submits that the near relatives have not challenged the execution and genuineness of the Will dated 06.07.1993 and, therefore, there is no need to give any evidence and to file examination in chief on affidavit of the witnesses and mere admission of near relatives of the deceased in respect of execution of Will in question is sufficient to prove the genuineness of the Will. He further submitted that the admission of near relatives is conclusive proof of this fact that the Will in question was duly executed by late Kavita Rani Bose in favour of applicant Smt. Bipasa Rani Bose. Learned counsel of the applicant relied upon decision of **Asber Reuben Samson and others vs. Eillah Solomon and others** reported in AIR 1991 Bombay 148 wherein it has been held by the Hon'ble Bombay High Court that *"Sections 275 to 283 of the Indian Succession Act, 1925 provide special rules for evidence and would have to be followed irrespective of any conflict between these provisions and provisions of Evidence Act."*

8. He next submitted that the Order 12 Rule 6 of the Civil Procedure Code says that *"Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make*



such order or give such judgment as it may think fit, having regard to such admissions.” He submitted that in view of the aforesaid provision of Civil Procedure Code, mere admission is sufficient to prove any fact and there is no need to produce any evidence to prove the admitted fact and, therefore, in the light of aforesaid provision of C.P.C., this court should grant probate in favour of the applicant on the basis of admission of near relatives of the deceased. He also relied upon decision of **Messrs Mehta Parikh and Company vs. The Commissioner of Income-tax, Bombay** reported in AIR 1956 SC 554 wherein at para 17 of the judgment, the Hon’ble Apex Court has held that *“Facts proved or admitted may provide evidence to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law.”*

9. He further submitted that admittedly, the original Will has been filed on behalf of the applicant in the present matter and Section 22 of the Indian Evidence Act, 1872 prohibits oral admissions as to the contents of a document and furthermore, Section 91 of the Indian Evidence Act says that if a document has been executed in respect of terms of a contract, or of a grant, or of any other disposition of property, the said terms of contract or of grant or the disposition of property can only be proved by the



aforesaid documents itself. He submitted that in the present case, the applicant has brought the original Will on record and, therefore, there is no need to produce any witness to prove the aforesaid Will in question.

10. He further submitted that no doubt, Section 68 of the Indian Evidence Act, 1872 says that if a document is required by law to be attested, the said document shall not be used as evidence until one attesting witness, at least, has been called for the purpose of proving its execution but in the present case, admittedly, one of the attesting witnesses of the Will in question has verified the petition and has also filed affidavit in support of verification as well as execution of the Will by late Kavita Rani Bose and, therefore, there is no further need to file examination in chief of the aforesaid attesting witness on affidavit afresh because filing of examination in chief on affidavit afresh is mere repetition of his previous statement and, therefore, in the aforesaid circumstance, it is obvious that the compliance of Section 68 of Evidence Act has already been done and the execution of the Will in question has already been proved by the attesting witness. Therefore, in the aforesaid circumstance, this court should grant probate in favour of the applicant on the basis of admission of near relatives as well as on the basis of affidavit filed by the attesting witness.



11. Having heard the contentions of learned counsel of the applicant, I went through the record as well as decisions cited on behalf of the applicant and the relevant provisions of Indian Succession Act, Indian Evidence Act as well as Patna High Court Rules.

12. Certain facts are admitted. It is an admitted position that applicant Smt. Bipasa Rani Bose filed petition under Section 273 read with Section 276 of the Indian Succession Act, 1925 for grant of probate of Will dated 06.07.1993 said to be executed by late Kavita Rani Bose in favour of Smt. Bipasa Rani Bose. The aforesaid probate petition has been verified by one attesting witness, namely, Sri Shailesh Kumar Singh and affidavit of the aforesaid attesting witness has also been filed in respect of verification of the petition. It is also an admitted position that general citation as well as special citation were issued and no one including near relatives raised any objection in respect of grant of probate of Will dated 06.07.1993 in favour of applicant Smt. Bipasa Rani Bose and furthermore, all the near relatives accepted that Late Kavita Rani Bose had executed Will dated 06.07.1993 in respect of her properties in favour of Smt. Bipasa Rani Bose. Furthermore, it is an admitted position that this court directed the



applicant to produce evidence but no evidence was adduced by the applicant in support of her probate petition.

13. Section 281 of the Indian Succession Act, 1925 says as follows:- “Where the application is for probate, the petition shall also be verified by, at least, one of the witnesses to the Will (when procurable) in the manner or to the effect as mentioned in the section itself.” The aforesaid Section 281 of the Indian Succession Act, 1925 goes to show that whenever a petition for probate is filed, it is essential requirement that the aforesaid petition must be verified by at least one of the attesting witnesses in the manner as prescribed in the aforesaid section. In the present case, admittedly, one of the attesting witnesses of the Will dated 06.07.1993 has verified the above stated Will dated 06.07.1993 and also filed affidavit in support thereof. **Furthermore, I would like to refer Section 283 of the Indian Succession Act, 1925 which runs as follows:-** *(1) In all cases the District Judge or District Delegate may, if he thinks proper,-*

(a) examine the petitioner in person, upon oath;

(b) require further evidence of the due execution of the Will or the right of petitioner to the letters of administration, as the case may be;



(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court -house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

14. The bare perusal of Section 283 of the Indian Succession Act, 1925 goes to show that the Court can direct the applicant to examine in person upon oath and adduce further evidence of the due execution of the Will. Therefore, the aforesaid provision makes it clear that it is the discretion of the court to direct the applicant to prove the execution of the Will and mere admission by near relatives is not sufficient to prove that the Will has duly been executed. The above stated provisions lay down the mode of proof in probate cases and the aforesaid provisions are an



independent features of Indian Succession Act and also departure from the provisions of Civil Procedure Code. Furthermore, I would like to refer Section 68 of the Indian Evidence Act which says 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. The aforesaid section makes mandatory the examination of attesting witness in case of Will. The aforesaid Section 68 of the Evidence Act goes to show that before admitting a Will in evidence, the aforesaid Will must be proved by the attesting witness. Admittedly, in the present case, not a single attesting witness has been examined by the applicant to prove the Will in question though opportunity was given to the applicant for examination of her witnesses. It is also an admitted position that there is nothing on the record to show that attesting witnesses of the Will dated 06.07.1993 are not alive or their attendance cannot be procured. Therefore, in my view, non-production of even a single attesting witness of the Will dated 06.07.1993 is hurdle in grant of probate in favour of the applicant.

15. It has been argued by learned counsel of the applicant that in the case of **Asber Reuben Samson and others**



(Supra), the Hon'ble Bombay High Court has held that examination of witnesses is not essential when the execution of the Will is admitted but in my view, the aforesaid decision is not applicable in the present case because in that decision ex-parte letter of administration was granted which was subsequently challenged and revocation of aforesaid letter of administration was prayed and in that circumstances, the Hon'ble Bombay High Court held that "even if the letter of administration was granted in terms of the consent terms, signed by the plaintiffs and defendants, there was no need to revoke the aforesaid letter of administration and in that backdrop, the Hon'ble Bombay High Court held that when there was consent between the parties, there was no need to further examine the witnesses. However, in the present case, no doubt, the near relatives admitted the execution of the Will dated 06.07.1993 and on the basis of aforesaid Will dated 06.07.1993 the applicant has sought for probate of the Will dated 06.07.1993 but in my view, mere admission and consent of the near relatives is not sufficient for grant of probate in favour of the applicant because before granting probate a heavy duty is cast upon the court to see the authenticity and genuineness of the Will in question and furthermore, in my view, no probate can be granted on the ground of compromise. Furthermore, I am of the view that even if the



applicant and near relatives of a probate case enter into compromise, then also, the court is bound to see the genuineness and authenticity of the Will in question. The authenticity and genuineness of the Will can only be proved by the evidence of the attesting witnesses and others. Admittedly, in the present case, neither applicant has herself come before the court nor any witness including attesting witnesses have come forward to prove the execution and authenticity of the Will dated 06.07.1993. So far as verification of the petition and filing of affidavit in support of that verification is concerned, in my view, the verification as well as filing of the affidavit in support of verification is pleading of probate petition and the pleading cannot take place of evidence. Therefore, even if the attesting witness has filed affidavit in support of verification, then also, that affidavit cannot be treated as evidence.

16. Learned counsel of the applicant has argued that Order 12 Rule 6 of the C.P.C. provides that if any fact is admitted, the court is bound to pronounce judgment on the aforesaid admitted fact without waiting for determination of any other question. He has further argued that since in the present case, the near relatives of the applicant have admitted the execution of the Will dated 06.07.1993, there is no need to prove the execution of



the Will dated 06.07.1993 and this court is duty bound to give its finding on the above stated admitted facts. In support of his above stated contention, he has referred the decision of **Karam Kapahi & Ors. vs. M/s Lal Chand Public Charitable Trust and another** reported in AIR 2010 SC 2077. However, most humbly I am unable to accept the aforesaid contention. No doubt, Order 12 Rule 6 of the C.P.C. says that admitted fact does not need to be proved and the court has to pronounce judgment on the admitted facts but in probate case as I have already stated that even if the parties to the probate case admit the execution of the Will, then also, it is incumbent duty of the court to see as to whether Will has been executed in accordance with law or not and, therefore, in my view, Order 12 Rule 6 of the C.P.C. is not applicable in probate case, particularly, in the light of special procedure as provided in Indian Succession Act, 1925.

17. It has also been argued on behalf of the applicant that Section 22 of the Evidence Act prohibits oral evidence as to the contents of a document and in the present case, the original Will has been filed and, therefore, there was no need to record oral evidence of attesting witnesses but again I am unable to accept the aforesaid contention of learned counsel of the applicant because Section 68 of the Evidence Act, specifically, states that execution



of the Will can be proved only by examination of one of the attesting witnesses of the Will and Section 283 of Indian Succession Act gives power to court to direct the applicant to produce evidence and, therefore, in view of Section 68 of the Evidence Act as well as Section 283 of the Indian Succession Act, in my view, the above stated contention of learned counsel of the applicant is not tenable.

18. In course of hearing, learned counsel of the applicant has relied upon decision of **Thayyullathil Kunhikannan and others vs. Thayyullathil Kalliani and others** reported in AIR 1990 Kerala 226 in which Hon'ble Kerala High Court has held as follows:- *“Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, Section 68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 has to be read as overriding section 68 and as obviating the necessity for calling an attesting witness, unless the execution of the Will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a Will could be used as evidence.”* However, in my view, the aforesaid decision is not applicable in the present matter because the aforesaid finding of Hon'ble Kerala High Court came in a dispute of partition suit and



in the aforesaid partition suit, the Will in question was admitted between the parties and in that circumstance, the Hon'ble Kerala High Court observed that when the execution of the Will was admitted, there was no need of formal proof of the aforesaid will by examining an attesting witness. However, as I have already discussed that the present matter relates to grant of probate and before grant of probate, it is the duty of the court to satisfy itself about the genuineness of the execution of Will and, therefore, in probate case without examining the attesting witness or without taking evidence on the point of execution of the Will, the probate cannot be granted and, therefore, the above stated decision is not applicable in the present case.

19. However, recently in the case of **Sri Indra Kumar and others vs. Saloni Kumari and others** reported in 2019(1) PLJR 686 at para 27 of the aforesaid judgment, a Division Bench of this Court has held as follows:- *“There should not be iota of doubt about the proposition of law that the court granting letters of administration has to satisfy itself, not only about the genuineness of the Will but also satisfy itself that it was not fraught with suspicious circumstance. To prove the validity of a Will executed by the testator, attestation by the witnesses as contemplated under Section 63 of the Indian Succession Act and Section 68 of the Evidence Act read with Section 3 of Transfer of Property Act need to be proved first by the*



propounder of the Will.” In view of the aforesaid dictum of Division Bench of this Court, there is no scope to differ with the above stated finding of the Division Bench of this Court. However, as I have already stated that before grant of probate, it is the incumbent duty of the court to satisfy itself about the genuineness of execution of the Will and in the present case, admittedly, the applicant has not adduced any evidence except production of original Will as well as death certificate of testatrix and, therefore, in my view, for want of evidence this probate petition is liable to be dismissed.

20. Accordingly, on the basis of aforesaid discussions, this probate petition stands rejected.

(Hemant Kumar Srivastava, J)

shahzad/-

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