

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 149 of 2017
with
CAN 1 of 2016 (Old No: CAN 12028 of 2016)

Bandana Bandapadhyaya
versus
Neeti Bhattacharjee & Ors.

For the Appellant : *Mr. Saptangsu Basu, Sr. Adv.,*
Mr. Partha Pratim Roy.

For the Respondents : *Mr. Pratip Kumar Chatterjee,*
Mr. Chittapriya Ghosh,
Ms. Priyanka Saha,
Mr. Komal Sinya.

Hearing is concluded on : *25th November, 2022.*

Judgment On : **12th December, 2022.**

Partha Sarathi Chatterjee, J.

1. This appeal is directed against the judgment dated 19.9.2016 passed by the learned Additional District Judge, Kandi in Testamentary

Case no. 01 (A) of 2014 whereby the prayer of the propounder for grant of probate in respect of the Will allegedly executed by the testator, namely, Taponarayan Bandapadhyaya was turned down.

2. Facts required to be adumbrated for the purpose of adjudication of the appeal, in brief, are that one Bandana Bandapadhyaya, wife of Paresh Bandapadhyaya filed one petition under Section 276 of Indian Succession Act, 1923 (hereinafter referred to as the said petition) stating, *inter alia*, that Taponarayan Bandapadhyaya (hereinafter referred to as the testator) died on 11.12.2010 at his permanent abode located at Ruppur, P.S. Kandi, District-Murshidabad and he executed his last Will and testament on 20.7.2001 in presence of attesting witnesses bequeathing all his estate in favour of his son, Paresh Bandapadhyaya (hereinafter referred to as the legatee) and the present appellant/petitioner, Mrs. Bandapadhyaya, was appointed executor.

3. Record postulates that all the requirements of Section 276 of Indian Succession Act, 1923 (hereinafter referred to as the Act of 1923) were complied with and next kin of the testator were impleaded as opposite parties in the petition. Initially, the aforesaid petition was filed before learned District Delegate and the same was registered as Probate case no. 12 of 2012 but since opposite parties/respondent nos. 1 and 2 herein impeached the Will by filing written objection, the same became contentious and was placed before the learned District Judge, Murshidabad and the same was registered as Testamentary Case no. 01(A) of 2014 and transferred to the Court of the learned Additional District Judge, Kandi for disposal.

4. In the written objection used by the respondent nos. 1 & 2, the crux of their contention was that during his lifetime, the testator had never executed any Will and even the testator had never expressed his intention to execute any Will. The same was prepared behind the back of the testator. The executor did not disclose anything about the Will beforehand and after lapse of a pretty long time, suddenly, the executor took out the Will on an anticipation that the same would be probated basing upon the false evidence of her own men.

5. The respondent nos. 3 and 4 in their written objection had stated that if probate is granted in respect of the subject Will, they would not have any objection.

6. In support of her contention, the petitioner herself deposed as P.W.1 and also adduced oral accounts of two witnesses namely, Barun Mukherjee and Priyabrata Bhattacharya, who were examined as PW-2 and 3 respectively. The petitioner tendered some documents namely, the Will, marked as Ext.-1, L.R. R-O-R of Khatian nos. 517 and 930, marked as Ext. 2 and Ext. 2/1 and copy of deed no. 2328 of 2008 (executed by the testator), marked as Ext.-3.

7. On the other hand, to resist the grant of probate, the respondents adduced oral testimonies of Niti Bhattacharya, Partha Sarathi Das and Ajoy Pradhan, who were examined as O.P.W-1, 2 and 3 respectively. The respondents also submitted some documents being a letter written by the father of respondent no.1, the death certificate and discharge certificate

(carbon copy) of the mother of PW-1, which were marked as Ext. A, B & C respectively.

8. By the judgment impugned, the learned Court below refused to grant probate in respect of the subject Will and aggrieved thereby the appellant has approached this Court contending, *inter alia*, that the learned Court below erred in refusing to grant probate by disbelieving the evidentiary value of the petitioner's deposition. The Court had erroneously shifted burden upon the executor to remove the doubt of undue influence. Probate had been denied on the ground of minor discrepancies in the evidence of the propounder and taking one portion of the evidence of the propounder in isolation and in not considering the entire evidence. Probate was erroneously refused since the testator sold out some of his properties which were also subject matter of the Will.

9. While pressing this appeal, learned senior advocate Mr. Saptanshu Basu being assisted by Partha Pratim Roy, drawing our attention to the depositions of scribe and attesting witness submitted that the executor has successfully proved that the Will was duly executed and attested in conformity with the provisions of S.63 (c) of Act of 1923 and 68 of Evidence Act, 1872. Drawing our attention to the cross-examinations of scribe and attesting witness, Mr. Basu submitted that evidence of scribe and attesting witness have not been shaken in cross-examination.

10. He added that the opposite parties did not take any plea that the Will was forged, manufactured nor did they also take any plea that testator was put under coercion, undue influence or fraud has been practised.

Drawing our attention to the written objection used by the O.P. nos. 1 and 2 before the learned Court below, he submitted that the O.P. nos. 1 and 2 only took the plea that testator had never executed such Will and except this, no other plea has been taken. Hence, in view of such circumstances, since the propounder proved execution and attestation, probate should have been granted. He, however, added that in addition to giving proof of execution and attestation, propounder has an additional duty to remove the suspicions, if any, surrounding the Will from the mind of the Court.

11. He submitted that initially, the opposite parties expressed suspicion regarding use of surname of the testator. Placing Ext. A, a letter allegedly written by the testator, opposite parties raised a point that the testator ought to have signed his name as 'Taponarayan Banerjee' but the learned Court below did not accept such plea. He argued that both in the Will (Ext.-1) and in the subsequent deed (Ext.-3), testator put his signature as 'Taponarayan Bandopadhyaya' and from the evidence, it emerged that Taponarayan Banerjee and Taponarayan Bandopadhyaya was the same and identical person and his signature has not been challenged.

12. He further argued that the Will was executed on 20.7.2001 and the same was registered on 27.7.2001. PW-1 while giving deposition stated that the '*Will was prepared on 27.7.2001 in our house and it was registered on the same day*' and the learned Court below has observed that the person, who was required to remove the suspicions surrounding the execution and attestation of the Will, has herself created suspicion by making such statement and hence, the learned Court below has refused to grant probate

though such discrepancy in the evidence of PW-1 is a minor discrepancy and it is to be noted that Will was executed in 2001 and PW-1 deposed in 2014 i.e. after almost 13 years and it is well settled that power of observation, memory of all persons is not the same and in view of the fact that one lady, who is giving deposition regarding one incident occurred prior to 13 years, such discrepancy is quite normal.

13. He asserted that all the requirements for grant of probate have been fulfilled and hence, refusal to grant probate due to such minor discrepancy is bad and he submitted that it is a fit case to grant probate in respect of the subject Will and in support of such contention, he has placed reliance upon the judgments delivered in the cases of *Rajlakshmi Dassi Bechulal Das -vs- Krishna Chaitanya Das Mohanta*, reported in AIR 1972 Cal 210, *Shashi Kumar Banerjee and others -vs- Subodh Kumar Banerjee since deceased and after him his legal representatives and others*, reported in AIR 1964 SC 529, and one unreported judgment passed by a coordinate bench of this Court in F.A. no. 47 of 2008.

14. *Per Contra*, Mr. Chittapriya Ghosh, learned advocate for the respondents herein submitted that the Will is clouded with suspicious circumstances and the petitioner/appellant had miserably failed to remove such suspicions and he added that there is suspicion regarding use of surname of the testator while putting his signature. From Ext.-A, it would transpire that the testator signed as Taponarayan Banerjee but in the Will, he allegedly signed as Taponarayan Bandopadhyaya and the petitioner had failed to remove such suspicion. He stated that the Will was allegedly

prepared in presence of the petitioner on 20.7.2001 and same was allegedly registered on 27.7.2001 but PW-1 had herself deposed that the Will was prepared on 27.7.2001 and was registered on the same day.

15. Mr. Ghosh argues that there was no reference of the Will in the subsequent deed of sale. After execution of alleged Will, testator sold out his property and this fact itself speaks that testator was not aware of the Will and hence, such Will cannot be stated to be last Will and testament of the testator.

16. He asserted that the learned Court below has rightly held that petitioner had failed to remove the suspicions rather she herself while giving deposition has created suspicion. The beneficiary, being the husband of the executor took active part in preparation and execution of the Will which is also one of the suspicious circumstances and for justified reasons, the learned Court refused to grant probate by passing a reasoned order leaving no scope to interfere with the same. In support of such contention, he placed reliance upon the judgments delivered in the cases of *Kashibai W/O Lachiram & Anr vs Parwatibai W/O Lachiram & Ors.*, reported in 1995 AIR SCW 4631, *Kartar Kaur & Anr. -vs- Milkho & Ors.*, reported in (1996) 11 SCC 626, *Bharpur Singh & Others -vs- Shamsher Singh*, reported in (2009) 3 SCC 687 and *S.R. Srinivasa & Ors. -vs- S. Padmavathamma*, reported in (2010) 5 SCC 274.

17. In reply, Mr. Basu submitted that Will takes effect from the date of death of the testator and recital of the Will says that all the immovable and movable properties which the testator would leave at the time of his death,

would go to the legatee and till his death, testator intended to enjoy those properties and such desire of the testator was recorded in the Will and he argued that since one property was sold by the testator, it cannot be stated that Will has lost its force. The testator himself gave reason for sale in the sale deed and lastly, he asserted that the judgments, upon which reliance has been placed by Mr. Ghosh, are distinguishable on facts.

18. In the backdrop of the arguments advanced, the Court is entrusted with the job to decide the questions as follows :

i) *whether petitioner has been able to prove that Will was duly executed and attested by giving satisfactory and convincing evidence ?*

ii) *whether testator was sound and having a disposing state of mind ?*

iii) *whether the testator knew and approved the contents of the Will and understood the nature and effect of dispositions ?*

iv) *whether the petitioner has been able to remove all the suspicious circumstances surrounding the Will ?*

19. All the afore-mentioned points are taken up together for discussion and determination since they are inter-connected with each other.

20. It goes without saying that a Will must be proved having regard to the provisions contained in Section 63 (c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a Will must prove its execution by examining one or more

attesting witnesses and the propounder must remove all the suspicious circumstances surrounding the Will and if the Will is impeached on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator to prove the same. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator. It is trite that enumeration of suspicious circumstances cannot be made exhaustively.

21. In the given case, in written objection, signature of the testator appearing on the Will has not been challenged. After closure of evidence, opposite parties made an application under Order 26 Rule 10A CPC which was turned down by the learned Court below and challenging the said order of the learned Court below, one civil revision being C.O. no. 1699 of 2015 was preferred before this Court but the same has not been entertained. Such order of the learned Single Bench of this Court has not been assailed in any forum and even in the written objection and in the memorandum of appeal also, no point has not been raised that Will did not contain actual signature. So, ultimately signature of the testator has been left unchallenged.

22. Records would reveal that PW-3, scribe deposed that he scribed the Will at the residence of the testator and then, testator put his signature thereon and then three witnesses namely, Barun Mukherjee, Pratul Mukherjee and Anand Dulal Mukherjee, since deceased attested the Will. The petitioner was appointed executor and in cross-examination, he stated

that all the persons put their respective signatures in his presence and testator was known as 'Taponarayan Bandopadhyaya'.

23. PW-2, the attesting witness deposed that at the time of execution of the Will, he along with his two neighbours namely, Pratul and Anand Dulal were present and testator executed the Will putting his signature in Bengali in his presence and then, he along with the other witnesses put their respective signatures on the Will and he deposed that testator was known as Taponarayan Bandopadhyaya and Taponarayan Banerjee in the locality.

24. Admittedly, evidence of PW-2 and PW-3 have not been shaken in cross-examination. Will was registered in 2001 and subsequent thereto, testator sold out one property in 2006 and testator died in 2010. So, here, it can be stated that at the time of execution i.e. in 2001, the testator was in sound disposing state of mind. No evidence has come that in 2001 testator was not having testamentary capacity.

25. Admittedly, the testator had bequeathed his estate entirely to his son. It is settled proposition of law that Will is executed to alter the normal rule of succession and mere, deprivation will not automatically lead the Court to hold that Will is shrouded with suspicious circumstances but each case shall depend upon its own facts and circumstances. In the given case, considering the totality of the fact and circumstances, unimpeachable evidence of PW-2 and PW-3, we are of the view that deprivation itself ought not to have led the Court to hold that the Will is clouded with suspicious circumstances.

26. The learned Court below had refused to grant probate primarily on two grounds. The first ground is that PW-1 while giving deposition had stated that the Will was executed on 20.7.2001 and that the same was registered on the same day. The PW-3, however, deposed that the Will was registered on 27. 07. 2001. Such inconsistency, according to the learned Court below, was fatal and suspicious enough to doubt the very execution and existence of the Will.

27. We are unable to affirm such finding. Needless to mention that while appreciating evidence, Court shall take into account the totality of facts and the circumstances to ascertain whether there was due execution and it shall not appreciate the evidence taking out any sentence in isolation from the deposition of any witness and the entire evidence is required to be scanned and Court shall see the character of the witnesses, the length of time which has elapsed since the transaction took place, nature of the fact deposed etc. Existence of certain discrepancies in evidence is quite natural. Court shall see whether such discrepancy goes to the root of the case and destroys the case of that party for whom such witness is deposing.

28. PW-1 did not play any role in execution and attesting of the Will and she has merely stated that such incidents occurred in her presence. She is a lady and she has given her deposition after 13 years from the date of the execution and attestation. She deposed that she did not go to the office of the Registrar. She was not a witness to registration. Isolating and picking up the sentence that *'Will was prepared on 27.7.2001 in our house*

and it was registered on the same day' from the deposition of PW-1, unimpeachable evidence of PW-2 and PW-3 cannot be discarded.

29. The second ground, according to the learned Court, was that since the testator had sold out one property in 2006 i.e. subsequent to execution of Will, the testator had no intention to bequeath his estate to the legatee. There is no warrant in law for the proposition that alienation of part of property covered by a will is indicative of revocation thereof. A Will is after all an ambulatory document and so operative only upon the property which exists at the time of the testator's death. Omission to make reference of the Will in the subsequent deed of sale is not a suspicious circumstance and for such cause only, grant of probate cannot be refused. We therefore overrule the second ground.

30. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. Now, let us look into the judgments relied upon by the respondents. There is no dispute as regards the proposition of law laid down in the judgments upon which reliance has been placed by Mr. Ghosh but the said judgments are distinguishable on facts. In case of *S.R. Srinivasa & Ors. (Supra)*, suit was for declaration and recovery of possession in which defendant took the plea that Will was executed bequeathing the property in favour of one person but to prove the Will, attesting witness had not been examined and there was no

reference of Will in subsequent suit and hence, Court refused to accept such Will. In the case of *Kartar Kaur & Anr. (Supra)* the testator was an illiterate person and the Will contained a thumb impression. In the case of *Bharpur Singh and others (Supra)* it was alleged that the testatrix lost her balance of mind and had not been possessing sound mental faculties. In the case of *Kashibai (Supra)* a finding was arrived at that none of the witnesses deposed that the testator had signed the said will before them and that they had attested it.

31. In the present case the petitioner has proved due execution and attestation of the Will and has also proved that testator was in sound disposing state of mind. He was a literate person and he executed the Will by putting his signature thereon. The minor discrepancy in the evidence of PW-1 does not go to the root of the matter and hence it would not be proper to refuse to grant of probate on imagination and/or supposition of existence of suspicious circumstances.

32. Hence, the appeal be and the same is allowed, however, without any order as to the costs. The judgment impugned herein is hereby set aside. Let probate be granted in respect of last Will and testament of Taponarayan Bandopadhyay executed and registered on 20.7.2001 and 27.7.2001 respectively upon deposition of ad-valorem Court fees as would be assessed by the competent authority on consideration of valuation of the properties in question as on this date.

33. The lower court records along with the original registered Will be sent down to the learned Court below forthwith.

34. The appeal being FA 149 of 2017 is, accordingly, disposed of. The application being CAN 1 of 2016 (Old No: CAN 12028 of 2016) has already been disposed of earlier by an order dated 7th December, 2021.

35. There shall, however, be no order as to costs.

36. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)