

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 131 of 2016

Kashinath Ghosh
versus
Smt. Bhagirathi Mondal & Others

For the Appellant : *Mr. Anit Rakshit,*
Mr. Chandan Misra,
Ms. Sarda Sha.

For the Respondent No.1 : *Mr. Asit Kumar Routh,*
Mr. Tulshidas Ray,
Mr. Tirthankar Roy.

Hearing is concluded on : *2nd December, 2022.*

Judgment On : **16th December, 2022.**

Partha Sarathi Chatterjee, J.

1. The present appeal arises out of the judgment passed by the learned Additional District Judge, 2nd Court, Nadia in O.S. no. 11 of 2000 whereby the prayer for grant of probate was turned down.

2. Before we delve into the contour of controversies involved in the appeal, we may notice the facts of the case in brief, which are as follows :

- a. One Kashinath Ghosh filed one application for grant of probate in respect of last Will and testament of Kshudiram Ghosh on 02.05.2000 before the District Delegate, Ranaghat, Nadia and the said application was registered as Misc. Case no. 111 of 1997 (Probate) but the proceeding became contentious since one Bhagirathi Mandal filed written objection with a view to impeach the Will and then the said case was ultimately transferred to the learned Court below and was registered as O.S. no. 11 of 2000;
 - b. In the application, it was recited that Kshudiram Ghosh (hereinafter referred to the testator) during his life time by executing one Will bequeathed his estate in favour of the petitioner, namely, Kashinath Ghosh (hereinafter referred to as the petitioner) and the testator expired on 12.02.1996 at his permanent place of abode;
 - c. In the application, it was stated that the testator left behind him, four legal heirs namely, i) Radharani Ghosh, ii) Bhagirathi Mandal, iii) Ashalata Ghosh and iv) Sri Binod Bala but Binod Bala was not the kin of the testator and later on the name of Binod Bala was expunged and during pendency of the proceeding, Ashalata died and consequently, her name was also expunged.
3. Record reveals that requirements of Section 276 of Indian Succession Act, 1923 (hereinafter referred to as the Act of 1923) were duly complied with.
 4. Bhagirathi Mandal filed written objection wherein it was specifically contended that the Will was forged to grab the property of the deceased and

to deprive the natural heirs of testator from the estate of the testator. It was further contended that Radharani was first wife of the testator and Bhagirathi is the daughter of Radharani and testator whereas Ashalata happened to be the second wife of testator and the petitioner is the son of Ashalata and it was recited that the testator was on good terms with Radharani and Bhagirathi, who also had love and affection towards the testator and it was claimed that at his age of 75 years, testator went to Ichapur to live with his first wife where he became seriously ill and then after his sudden death, petitioner started propagating that the testator had bequeathed his estate to the petitioner by executing one Will but at that time testator had no physical and mental ability to make any Will and she claimed that testator died intestate and she inherited the proportionate share of properties left by the testator and the petitioner tried to dispossess her from the properties which she inherited and hence, she filed two suits *vide. nos. T.S. 106 of 1996 and T.S. 38 of 2000* and on receipt of summons of first suit, petitioner had filed this application for grant of probate and lastly, prayer was made for dismissal of the application.

5. One Binod Bala also filed his written objection contending *inter alia* that the Will was forged and not fit to be probated and that Ashalata happened to be the maid servant of testator and the petitioner was her son and he used to live with his mother and that Radharani and Bhagirathi used to look after the testator and it was asserted therein that the testator had never executed the alleged Will.

6. Upon pleadings of the respective parties, the learned Court below framed as many as 7(seven) issues. To substantiate his claim, the petitioner adduced oral accounts of one Bijan Kumar Ghosh, of himself, of Monju Ghosh and also of one Sri Haradhan Nayak, who were examined as PW 1 to 4 respectively and petitioner produced the Will, marked as Ext.-1. On the other hand, the opposite parties adduced oral testimonies of Binod Bala and Bhagirathi Mandal, who were examined as O.P.W.-1 and 2 respectively. Upon scrutiny of the pleadings and evidence of the respective parties, the learned Court below dismissed the suit and refused to grant probate in respect of the Will of Kshudiram.

7. The petitioner has impugned the judgment, *inter alia*, on the grounds that the learned Court below erred in overlooking the comprehensive evidence of PW-1 as regards the valid execution and attestation of the Will and even if it was found that evidence regarding attestation was technically insufficient, the learned Court below ought to have given opportunity to adduce further evidence. The learned Court below took an erroneous view regarding custody of the Will and erroneously observed that the Will is tainted with suspicious circumstances since in the Will there was no reference to first wife. The learned Court below should have granted the probate since petitioner had discharged his burden to prove that the Will was duly executed and attested.

8. Assailing the judgment impugned, Mr. Rakshit, learned advocate for the appellant, drawing out attention to Section 63(c) of Act of 1923, vociferously contends that two signatures of attesting witnesses are not

required to be appended at the same time and signature of one attesting witness in presence of the testator will suffice. He argues that the petitioner discharged his burden by proving execution and attestation of the Will and hence the Will was fit to be probated. In support of such contention, he placed reliance upon a unreported judgment of Hon'ble Supreme Court passed in Civil Appeal no. 202 of 1952 (*Naresh Charan Das Gupta -vs- Paresh Charan Das Gupta & Anr.*).

9. *Per Contra*, to lend support to the judgment impugned, Mr. Routh, learned advocate for the opposite parties, drawing our attention to the evidence of PW-1 submits that when the Will was scribed, the attesting witness was present but there is no indication that he was seen by the testator to attest the Will. He argues that execution and attestation of the Will have not been proved and evidence of PW-1 is not trustworthy and from the evidence it has surfaced that one lady was all along present at the time of alleged execution and that the petitioner is her son i.e. the beneficiary and the said lady, namely, Ashalata took active part in preparation of the alleged Will. He further argues that, in the Will there is no reference to the first wife, namely, Radharani and her daughter, namely, Bhagirathi and it is explicit from the recital of the Will that the testator had made two contradictory statements, once he depicted Ashalata as his sole wife and mother of his son and in another portion depicted Ashalata as his second wife. Such inconsistent statements give rise to a suspicion as regards authenticity of the Will. He asserts that the Will was prepared only to deprive Radharani and Bhagirathi. He argues that the learned Court below has passed a

reasoned order leaving no scope to be interfered with. To buttress his argument, he has placed reliance upon the judgments delivered in the cases of *Benga Behara & Anr. –vs- Braja Kishore Nanda & Ors.*, reported in (2007) 9 SCC 728, *Ramesh Verma (Dead) Thr. LRs. –vs- Lajesh Saxena (Dead) by LRs. & Anr.*, reported in (2017) 1 SCC 257 and *K. Laxmanan –vs- Thekkayil Padmini & Ors.*, reported in AIR 2009 SC 951.

10. To prove due execution and valid attestation of the Will, the PW1 deposed that he was a stamp vendor in Santipur Registry office. He stated that the Will was scribed by one Trilokesh Indra under instruction of the testator and the same was executed by the testator putting his signature on each page and he was present when the Will was scribed and he deposed that the scribe of the Will was alive but other witnesses of the Will are dead and in course of cross-examination he deposed that one lady was present at the time of execution of the Will but he could not say as to whether the said lady was the wife of testator. He had no knowledge about the number of the testator's children and he could not state the date on which the Will was prepared and the exact time when the deed was written. He also could not state as regards the time consumed for scribing the Will. He stated that he does not know whether Kshudiram executed the Will and then said that the Will was executed by the testator in favour of his son.

11. The petitioner, as PW-2, deposed that when the Will was prepared, he was a child and he was not present at the time of execution of the Will and he could not say who handed over the Will to him. He further stated that Radharani was the wife of Kshudiram whom he used to call 'boroma'. PW-3,

the daughter-in-law of the testator stated that the testator had discussed about the Will with her after six months of her marriage and the PW-4 spoke about the relationship between the testator, the petitioner and others.

12. O.P.W.-2 deposed that her father had never executed any such Will and Ashalata was not legally related to Kshudiram and the Will was a forged one and she stated that she along with her mother, Radharani inherited the property left by her father and they also sold out the property to Binod Bala.

13. It is axiomatic that to obtain a probate or letters of administration, as the case may be, in respect of one Will, the propounder must prove that the Will was signed by the testator i.e. the Will was duly executed and the same was validly attested. He must also establish that the testator was in sound disposing state of mind at the time of execution of the Will and that he knew and approved the contents of Will. The testator understood the nature of disposition and he put his signature on the Will out of his own free will. The propounder is also required to dispel all suspicious circumstances surrounding the Will and once these elements are established, it can be held that the propounder has discharged his onus and if Will is challenged on the ground of fraud, misrepresentation of fact or on the ground the testator was put under undue influence or coercion, then burden rests on the objector to prove the same.

14. Although in the judgment impugned, it was mentioned that the signature of the testator was marked as Ext. 1(a) but nowhere in the evidence of the petitioner, the signature of the testator was identified and/or proved. Although the PW-1 stated that he attested the Will under the

instruction of testator but he did not state that he and other witnesses put their respective signatures on the Will in the presence of the testator, which is a mandatory requirement for the attestation of the Will and his evidence stands shaken in cross-examination and such evidence does not inspire confidence in the mind of the Court to hold that Will was duly executed and attested.

15. Regarding the argument as advanced on behalf of the petitioner/appellant to the effect that two signatures of the attesting witnesses are not required to be appended at a time, it needs to be stated that it is true that two witnesses are not required to sign the Will at the same time but they are required to sign the Will in the presence of the testator. From the evidence of PW-1, it is not apparent whether the witnesses put their signatures to attest the Will in presence of testator and hence, the learned Court below has rightly held that this aspect creates suspicion surrounding execution and attestation of the Will. Factual matrix of the case cited on behalf of the appellant is totally different from the case at hand and hence, such judgment is distinguishable on facts.

16. On perusal of the contents of the Will, it transpires that on the first page, testator addressed Ashalata as his only wife whereas on the second page, he addressed her as his second wife. In the Will, there is no reference to Radharani or Bhagirathi. In view thereof, suspicion would arise in the mind of any prudent man as to whether the Will was scribed under the instruction of the testator and as to whether testator knew and approved the contents of the Will. Suspicion would also arise as to whether the testator

understood the nature of disposition and as to whether the Will was an outcome of his own free will. We are of the considered view that such suspicions have not been removed by the petitioner.

17. Although, it was claimed that the testator breathed his last on 12.02.1996 but the petitioner could not take any step to prove the same. When the Will was allegedly executed, the petitioner was 8 (eight) years of age and he could not say wherefrom he got the Will and under whose custody the Will was kept for such long years i.e. from 1973 to 2000. He miserably failed to dispel the suspicions surrounding the execution and attestation of the Will from the conscience of the learned Court and as such the learned Court below has rightly refused to grant probate in respect of the Will in question.

18. Consequently, the appeal being devoid of merit is dismissed. The judgment impugned is hereby affirmed.

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

20. Let a copy of this judgment along with the LCR and the Will be sent to the learned Court below forthwith.

21. 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.)