

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

**IA No.:CRAN/1/2019 (Old No.:CRAN/2606/2019)
in
C.R.A. 463 of 2018**

**Aniruddha Ghosh & Anr.
Vs.
Somnath Ghosh**

**For the Appellants : Mr. Somopriyo Chowdhury, Adv.
Mr. Dipayan Dan, Adv.**

**For the Respondent : Mr. Debashis Roy, Adv.
Mr. Pabitra Biswas, Adv.
Ms. Sreemayi Roy, Adv.**

Heard on : 24.12.2021, 11.05.2022.

Judgment On : 11.05.2022.

Bibek Chaudhuri, J.

This is an appeal under Section 341 of the Code of Criminal Procedure challenging the Order No. 24 dated 10th July, 2018 passed by the Learned Additional District Judge, 3rd Court at Barasat in Misc. Case No. 1728/2017 arising out of O.S. 39/2015, thereby dismissing appellants' application under Section 340 of the Code of Criminal Procedure.

The background of the present appeal may be summarized in the following words: -

One Annapurna Ghosh, since deceased, was the absolute owner of premises No.189, Bangur Avenue, Block-C, Kolkata – 700 055 (hereinafter described as the premises in suit). It is the case of the appellants that during her lifetime she executed her last testament and Will on 7th August, 2014 bequeathing the premises in suit jointly to his youngest son and younger daughter in equal share. It was also provided in the Will that the bequeathees would pay a sum of Rs.50 lacks to the elder son of the testator, namely Somnath Ghosh either in lump sum or by installment within a period of 2 and ½ years from the date of execution of the Will. After the death of the testator, the legatees being the joint executors of the Will proposed to pay a sum of Rs.50 lacks as per direction made in the Will to the respondent. However, the respondent on one pretext or the other neglected and refused to accept the said amount of money. After the death of the testator on 10th October, 2014, the respondent started making obstruction and hindrance over the peaceful enjoyment of the premises in suit by the appellants. On 14th November, 2014 the respondent wrote a letter to the appellants requiring them to disclose how and in what manner they proposed to pay the said sum of Rs.50 lacks. The appellants gave reply to the said letter describing mode and manner of the said sum. Series of transactions went on between the parties. The appellants made several proposals for payment of the said sum to the respondent but he on one pretext or the other did not receive the said amount. Subsequently, the respondent filed a suit in the 3rd Court of the learned Civil Judge (Junior Division) at Sealdah which was registered as Title Suit No. 34 of 2015 praying for declaration that the plaintiff/respondent has a specific charge of Rs.50 lacks over the said premises and the appellants are not entitled to deal with the said premises exclusively until the fulfillment of the obligation in terms of the Will. The respondent also prayed for

permanent injunction in the said suit against the appellants restraining them from entering into any agreement to any third party for developing the said premises and further restraining them from interfering with the respondent's right to access to the said premises till payment of the said sum of Rs.50 lacks.

During the pendency of the aforesaid suit, the appellants filed an application for grant of probate in respect of the last Will and testament dated 7th August, 2014 executed by the testator before the Learned District Delegate at Barasat. After service of notice, the respondent duly appeared in the said probate proceeding and filed an application for inspection of the Will. Since the probate proceeding became contentious, it was transferred to the Learned District Judge at Barasat who, in turn, transferred the said suit which was registered as O.S. 39/2015 to the 3rd Court of the Learned Additional District Judge at Barasat for disposal. In the meantime, the appellants filed an application under Section 151 of the Code of Criminal Procedure in Title Suit No. 34 of 2015, *inter alia*, praying for a direction upon the respondent to accept the entire sum of Rs.50 lacks.

It is further stated by the appellants that even in probate proceeding the appellants tried to pay the entire sum of Rs. 50 lacks to the respondent. In O. S. 39/2015 the appellants filed an application under Section 151 of the Code of Civil Procedure making similar prayer for direction upon the respondent to accept the said sum of Rs.50 lacks. In order to show their *bona fide* the appellants filed demand draft for the said amount which was, however, lapsed as the respondent did not receive the said sum. Thereafter, the appellants issued five cheques drawn on the State Bank of India, Bangur Avenue Branch in favour of the respondent but he refused to accept the said cheques. Subsequently, on 16th January, 2017 the respondent filed an affidavit

stating, *inter alia*, that he is not ready to accept the said sum for the reason that he believe that the Will is forged, void and inoperative.

Filing of such affidavit prompted the appellants to file an application under Section 340 of the Code of Criminal Procedure alleging, *inter alia*, that the respondent has committed perjury on oath by misguiding the Learned Court below and hindering the administration of justice by making false statement in the said affidavit, thereby contradicting his own stand taken in Title Suit No. 34/2015 instituted by the respondent himself. The said application came up for hearing before the Learned Additional District Judge, 3rd Court at Barasat after the application being registered as Misc. Case No. 1728/2017. The Learned Judge in Trial Court dismissed the said Misc. Case under Section 340 of the Code of Criminal Procedure on contest.

Mr. Somopriyo Chowdhury, Learned Advocate for the appellants submits that the respondent himself filed Title Suit No. 34/2015 in the 3rd Court of the Learned Civil Judge (Junior Division) at Sealdah. In the said suit the respondent prayed for declaration that a sum of Rs.50 lacks ought to be regarded as charge upon the bequeathed property and permanent injunction restraining the appellants/defendants from creating any third party interest in respect of the premises in suit and/or interfering with the respondent/plaintiff's access to the said premises in suit till the disposal of the said suit. The cause of action for institution of the said suit arose in favour of the respondent in view of the specific averment in the Will made by Annapurna Ghosh, since deceased. In other words, the respondent filed the said suit accepting the terms and conditions of the Will. Subsequently in O.S. 39/2015 the respondent as defendant had shown an affidavit stating, *inter alia*, that the Will executed by the testator is forged, void and inoperative.

According to Mr. Choudhury, Learned Advocate for the appellants, the respondent took absolutely contradictory stand in two judicial

proceedings believing that one of such stands is false to the knowledge of the respondent. Thereby the respondent misdirected the Court to act on the false evidence filed in O.S. 39/2015 and committed perjury. In support of his contention Mr. Choudhury refers to an old decision of this Court in the case of ***Habibullah –Vs.- Queen-Empress*** reported in ***(1884) ILR 10 Cal 937***. In the said report a Three-Judges' Bench consisting of Justice Wilson, Justice Tottenham and Justice Norris were pleased to hold that if it is an offence under Section 193 to make two contradictory statements, one or other which must be false, and to do so with guilty intention, on two distinct occasions, I think it must be equally an offence to make them on one occasion. The same principle was laid down by the Allahabad High Court in ***Umrao Lal –Vs.- State*** reported in ***1954 Cri.L.J.860***.

Mr. Debashis Roy, Learned Advocate for the respondent, on the other hand, submits that the respondent filed Title Suit No. 34/2015 for declaration and permanent injunction against the appellants without going through and having inspection of the so-called last testament of Annapurna Ghosh, since deceased. The respondent believed on the statement of his brother and sister that their mother executed a Will bequeathing her property in the manner as disclosed by the appellants. Therefore, he was anxious to get a sum of Rs.50 lacks from the appellants and filed the suit. However, after receipt of the notice of O.S. 39/2015 he inspected the so-called Will executed by Smt. Annapurna Ghosh. After inspection, he had every reason to suspect that the said Will is not genuine, forged, invalid and inoperative. Therefore, he filed an affidavit and denied to accept the sum of Rs. 50 lacks from the appellants. It is submitted by him that the respondent did not make any false statement in O.S. 39/2015 and the Learned Trial Judge rightly dismissed the application under Section 340 of the Code of Criminal Procedure filed by the appellants.

Section 191 deals with the offence of giving false evidence. Section 191 runs thus: -

191. Giving false evidence. – *Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.*

Explanation 1. – *A statement is within the meaning of this section, whether it is made verbally or otherwise.*

Explanation 2. – *A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.*

Section 193 is the penal provision for false evidence. Plain reading of Section 191 of the Indian Penal Code suggests that the intending offender is legally bound to state the truth by an oath or by express provision of law, or being bound by law to make a declaration, makes a false statement, and he makes a statement knowingly or believing it to be false or does not believe to be true.

It is needless to say that in a civil proceeding a defendant can take even inconsistent and contradictory plea in the same proceeding in support of his defence.

In the instant appeal, the defendants' affidavit on oath is sought to be made false statement because he filed a previous suit on the strength of the recital of the Will. Thus, it is contended by Mr. Chowdhury that the respondent cannot challenge the Will in a subsequent proceeding claiming to be forged, invalid and inoperative when he claimed his right

of having a sum of Rs.50 lacs on the strength of recital of the Will. The question that arise for adjudication in the instant case is as to whether the affidavit filed by the respondent in O.S. 39/2015 is false or not.

It is not disputed that the respondent got the opportunity to inspect the Will only in O.S. 39/2015. Only after such inspection it appeared to him that the said Will was a forged document. At this stage, the Learned Advocate for the appellants draws my attention to page 84 of the application for appeal which is a photocopy of the Order No. 8 dated 16.01.2017. The order was passed upon an application under Section 151 of the Code of Civil Procedure filed by the appellants requiring the respondent to accept the demand draft of Rs.50 lacs which they filed in Court. During the hearing of the said application, the respondent/opposite party contended that as per Clause 4 of the Will the petitioners are required to hand over Rs.50 lacs to the respondent in installments which is a charge on the property within a period of two and half years, failing which, the Will will be declared as null and void and the property will devolved to all three legal heirs in equal shares. It is further contended that in the written objection that till date, i.e., nearly two years three months from the demise of Annapurna Ghosh not a single penny has been paid to the respondent. The opposite party also stated that Will in question is not genuine and accordingly, the opposite party is not ready to accept the said amount.

The issue as to whether the respondent made a false statement in Court which amounts to giving false evidence within the meaning of Section 191 of the Indian Penal Code is to be considered in the light of the objection and the affidavit filed by the respondent.

It is needless to say that a Will becomes operative only after the death of the testator. In the instant case, the testator died on 10th October, 2014. In the year 2015, the appellants have filed an application for probate which was registered as O.S. 39/2015. A Will can

only be executed by the executors after grant of probate. As per the direction in the Will the appellants were directed to pay a sum of Rs.50 lacs to the respondent within two and half years from the date of execution of the Will. A Will cannot be said to be executed on the date on which the testator puts her signature. Because, it is already stated that a Will becomes operative only on the death of the testator. Nicety of the Will lies in the facts that execution of the testament starts only when the executor/executors are entrusted to execute the last desire of the testator. From the submission made by both the parties, it is ascertained that the appellants are ready and willing to pay Rs. 50 lacs to the respondent even before probate is granted in favour of the executors. On the contrary, in one proceeding the respondent demanded Rs.50 lacs and filed a suit for declaration and injunction alleging, *inter alia*, that until and unless the said amount of Rs. 50 lacs is paid by the appellants they may be enjoined from creating any third party interest and also from restraining the respondent of having the access in the premises in suit. In the subsequent probate proceeding he filed an affidavit stated, *inter alia*, that the Will is forged.

However, I have already recorded that the respondent/defendant can make contradictory statement in the written statement. It is not clear as to whether the respondent filed written statement in O.S. 39/2015. At this stage, in my consider view, it is premature to consider for the Court as to whether the respondent is liable for a penal action under Section 193 of the Indian Penal Code or not. However, this Court is inclined to keep the said issue open till the disposal of the suit and the appellants are at liberty to raise the same question on the basis of evidence that may be adduced by the parties during the trial of O.S. 39/2015 as well as Title Suit No. 34/2015.

In view of the above order, the impugned order passed in Misc. Case No. 1728/2017 is set aside and the same shall remain alive and be

directed to dispose of along with the suit. The instant appeal is, thus, **disposed of** with the above observation.

Urgent photostat certified copy of this judgment, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Bibek Chaudhuri, J.)

**Mithun/Srimanta
A.Rs.(Court)**