

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 122 of 2017

Ashoke Kumar Bag
versus
Smt. Nilima Rani Kotal & Anr.

For the Appellant : *Mr. Debasish Roy,*
Mr. Manish Sen.

For the Respondents : *Mr. Rabindranath Mahato,*
Mr. Aritra Shankar Ray.

Hearing is concluded on : *20th February, 2023.*

Judgment On : **3rd March, 2023.**

Partha Sarathi Chatterjee, J.

1. Judgment dated 18.12.2015 passed by the learned Additional District Judge, Fast Track, 3rd Court, Paschim Medinipur in O.S. No. 01 of 2006, whereby direction for grant of probate in respect of the Will and testament dated 28.06.1996 executed by one Manmatha Nath Bag was given, is under challenge in the present appeal.

2. One Nilima Rani Kotal (in short, Nilima) preferred an application under Section 276 of Indian Succession Act, 1925 (in short, Act of 1925)

before the learned District Delegate, Medinipur and the aforesaid application (hereinafter referred to as the said application) was registered as Probate Case no. 134 of 1997.

3. In the application, it was, *inter alia*, contended that her father, Manmatha Nath Bag, who died on 10.6.1997 at his permanent place of abode, executed his last Will and testament on 28.6.1996 and the Will was duly registered on the same day i.e. on 28.6.1996. Testator died leaving behind his widow, Puspa Rani Bag, one son, Ashoke Kr. Bag, the appellant herein and two daughters namely, Nilima and Sima Rani Das. Nilima alleged that at the relevant time of execution of the Will, testator was in sound and disposing state of mind and Nilima was appointed executor in the Will and hence, Will was fit to be probated.

4. Ashoke Kumar Bag (in short, Ashoke) and Sima resisted the application for grant of probate by filing written objection and in consequence, the case became contentious and was referred to the court of learned District Judge, Paschim Medinipur and ultimately, the case was transferred to the learned Court below and was renumbered as O.S. No. 01 of 2006.

5. Ashoke and Sima impeached the Will, *inter alia*, alleging that the Will was false, fabricated, manufactured and forged and testator had never executed and registered any Will in respect of the suit property and Nilima had manufactured the Will by way of false personification and attesting witness and identifier were the own men of Nilima and testator was not

physical fit and mentally sound at the time of execution and registration of the Will.

6. Upon pleadings of the respective parties, the learned Court below framed as many as six issues and record reveals that in corroboration of the fact projected in the application, Nilima adduced oral testimonies of six witnesses including herself, two attesting witnesses, Scribe, one deed writer and one official from the office of the District Sub-Registrar concerned. On the other hand, on behalf of the opposite parties, Ashoke adduced oral accounts of two witnesses including himself.

7. Nilima tendered two documents, Will and certificate of death of the testator which were marked as Ext.-1 and Ext.-2 respectively. Ashoke and Sima did not produce any documentary evidence.

8. By passing the judgment impugned, the learned Court below held the Will to be a genuine document. Aggrieved thereby, the Ashoke has preferred this present appeal, *inter alia*, contending that learned Court below misconstrued the evidence brought on record and it has not been taken into account that propounder received benefit under the Will and she took active part in preparation of the Will and propounder adduced false evidence through her yes-men and Will was obtained by practicing fraud and false personification and testator was not in sound and disposing state of mind at the relevant time of execution of the Will.

9. Mr. Debasish Roy, learned advocate appearing for the appellant submits that Nilima used to stay with the testator and Nilima tutored the

testator and she exercised her undue influence to get the Will executed and Nilima who received benefit under the Will was present at the time of execution of the Will and drawing our attention of the evidence of PW-4, he contends that PW-4, one of attesting witnesses did not support the propounder.

10. He further contends that there was an enmity in between Nilima and Ashoke and Nilima has deposed that she had filed one criminal case against Ashoke and hence, Nilima by manufacturing such sort of Will has tried to deprive Ashoke from his father's property. Taking us to the evidence of PW-3, he submits that PW-3 deposed that he wrote the Will under dictation of testator and then he said, learned advocate Mr. Mishra had drafted the Will under the dictation of testator and PW-3 stated that last part of the Will was written by the testator himself and although PW-3 stated that testator had one title suit against Ashoke but no particulars of any suit and/or case have been brought on record.

11. He argues that PW-3 stated that Ashoke was present at the time preparation of the Will but Nilima made contrary statement and such contradictions, in his view, are fatal. He further argues that PW-6 claimed that he read the contents of the Will but he deposed that in the Will, house and some other properties of village Keshpur were bequeathed but in fact, only the house was bequeathed and he asserts that for such sorts of contradiction, propounder is not entitled to get probate.

12. *Per Contra*, Mr. Mahato, learned advocate appearing for the respondents submits that purpose towards execution of a Will is to alter the

normal mode of succession and deprivation alone cannot be suspicious circumstances and he argues that testator bequeathed the property to his wife and Nilima and Sima were given right to collect rent from room nos. 3 and 4. Ownership of room nos. 3 and 4 have not been given to Nilima. So, it cannot be stated that Nilima received benefits under the Will and presence of Nilima beside her father at the time of execution of the Will cannot be suspicious circumstances.

13. He contends that propounder proved execution and attestation of the Will by giving reliable evidence and opposite parties did not plead that propounder exercised undue influence and they did not plead that there were suspicious circumstances and no suggestions on these score have been given to the witnesses of propounder.

14. He argues that PW-4 did not support his case nor did he destroy the case of the propounder and PW-3, who was suffering from old aged ailments, was examined on commission. He submits that another attesting witness, PW-6 by giving unimpeachable evidence, has proved execution and attestation of the Will.

15. He claims that from his application filed in connection with the appeal being IA : CAN 03 of 2021, it would be evident that by using the expression '*some other properties of village Keshpur*', PW-6 wanted to mean the land adjacent to subject house and he further claims that for the contradictions regarding dictation of testator appearing in the evidence of PW-3, which are minor contradictions, are not strong enough to destroy the case of the propounder.

16. He argues that Ashoke did not inspect the Will and hence, all the objections taken against grant of probate are based on conjectures and surmises and from the evidence of DW-2, it has been proved that relation in between Ashoke and testator was not cordial and conjoint reading of the Will and evidence of DW-2 will justify the deprivation of Ashoke.

17. He submits that here, requirements of Section 63(c) of Act of 1925 and Section 68 of Evidence Act have been fulfilled and either from the pleadings or from the evidence of the parties, no reference of suspicious circumstances has come and hence, learned Court below has rightly directed to grant of probate.

18. Admittedly, person propounding the Will must prove:

- (i) That the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and
- (ii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence.

19. If propounder can prove execution and attestation by adducing reliable, disinterested and trustworthy witness or witnesses and if he can remove the suspicion, if surrounded the Will, onus of the propounder can be taken to be discharged and if a caveat is filed alleging the exercise of undue

influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may, have to be proved by the caveators.

20. Every circumstance is not suspicious circumstance. Basically, a circumstance is 'suspicious' when it is not normal or is '*not normally expected in a normal situation or is not expected of a normal person*'. The suspicious features must be '*real, germane and valid*' and not merely the '*fantasy of the doubting mind*'.

21. In case of Bharpur Singh reported in (2009) 3 SCC 687, some illustrations of suspicious circumstances were given which are as follows :

i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature; ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time; iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason; iv. The dispositions may not appear to be the result of the testator's free Will and mind; v. The propounder takes a prominent part in the execution of the Will; vi. The testator used to sign blank papers; vii. The Will did not see the light of the day for long; viii. Incorrect recitals of essential facts.

22. In the given case, PW-2, employee of District Sub-Registrar concerned has deposed that Will was executed on 28.6.1996 and on that date Will was presented for registration and he brought copy of such Will. PW-3 deposed that he scribed the Will and he identified the Will and he

identified the signature of the testator also and he deposed that one part of the Will was written by the testator himself.

23. PW-5 deposed that PW-3 wrote the Will and testator put his signature in the Will in presence of PW-6 and other two witnesses and in his presence also and he identified the testator before the Registrar and he identified his signature appearing on the Will and PW-6 deposed that testator executed the Will in his presence and then he and PW-4 put their signature to attest the Will and testator saw him to put his signature on the Will.

24. On perusal of the Will, it appears that name and particulars of the executor were written by the testator himself and that portion of handwriting of the testator was proved by PW-3.

25. Now, admittedly, PW-4 identified his signature on the Will but he could not remember as to whether he put his signature to attest the Will and/or as to whether testator executed any Will or not. PW-3 wrote the Will as per dictation of testator and then said learned Advocate Indu Bhusan Mishra drafted the Will under the dictation of testator and seeing that draft, he wrote the Will. PW-3 deposed that testator's son was present at the time of preparation of the Will but PW-1 stated that testator's son was not present and PW-6 deposed that house and some other properties of village Keshpur were bequeathed.

26. Now, question is whether for these contradictions, grant of probate is to be refused ?

27. It is to be noted that Testamentary Court is not a Court of suspicion but that of conscience. It has to consider the relevant materials instead of adopting an ethical reasoning and while appreciating evidence of any witness, Court shall not consider any statement in isolation and Court shall consider the evidence as a whole and it is also to be noted that even if major portion of evidence is found deficient, residue, if found trustworthy, can be relied upon and contradictions appearing in the evidence if does not destroy the entire case going to its root, such contradictions cannot be held to be fatal.

28. It is trite of law that as in the case of proof of other documents so in the case of proof of Will, it would idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of one prudent man.

29. When more than one witness depose to prove either any fact in issue or relevant fact, then it would not be expected that all witnesses shall adduce parrot like evidence. Some contradiction, discrepancies etc. are quite normal and in that case, Court shall see whether basic features of the evidence have been consistently viewed or not.

30. In the given case, if the basic features of evidence of PW-6, PW-5 and PW-3 are taken into account it would be evident that they have conjointly voiced that Will was executed in their presence and the same was attested in conformity of Section 63 of Act of 1925. Execution and attestation of the Will were proved as per Section 68 of Evidence Act and substantial portion of evidence of PW-6 and PW-3 has not been shaken in

cross-examination. The evidence of PW-5 is unimpeachable and we are in agreement with Mr. Mahato on the point that PW-4 has neither supported nor has destroyed the case of propounder.

31. It goes without saying that mere exclusion of any legal heir *per se* shall not be treated as suspicious circumstances unless the Will is surrounded by other suspicious circumstances since main moto to execute the Will is to alter the normal mode of succession. Hence, deprivation of Ashoke and Sima itself cannot be held to be a suspicious circumstances in absence of any other suspicious circumstances and from the evidence of DW-2 and from recital of Will, it has been proved that relation in between Ashoke and testator was not cordial which has justified his deprivation.

32. Ashoke and Sima, the caveators took the plea that Nilima taking benefit under the Will took prominent part in preparation of the Will but on scrutiny of the Will, it transpires that Nilima got right to collect rent from the tenant of room no. 3 only and property was actually bequeathed to the wife of testator and mere presence of Nilima at the time of preparation of the Will cannot be held to be '*taking prominent part in preparation of the Will*'.

33. In the case at hand, caveators raised a plea that Nilima exercised undue influence but no evidence has been adduced to prove that Nilima was in a position to dominate the Will and had Nilima done so, Nilima could have led the testator to bequeath the entire property in her favour and Ashoke claimed that Will was executed and registered by way of false personification but the caveators failed to discharge their burden by bringing any cogent evidence on record to materialise such pleas.

34. Consequently, we do not find any infirmity, irregularity and illegality warranting interference with the judgment impugned.

35. In the result, the appeal fails. Judgment impugned herein is affirmed. Parties to bear their own costs.

36. Let a copy of this judgment along with LCR be sent down to the learned court below forthwith.

37. 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.)