

15.03.2023
SL No.141
Court No.8
(gc)

**FA 124 of 2008
CAN 5411 of 2007**

**Shri Himangshu Dutta & Anr.
Vs.
Shri Kishan Lal Dutta & Ors.**

Mr. Arijit Bardhan,
Ms. Deblina Chattaraj,
Mr. Rishabh Dutta Gupta,
...for the Appellants.

Re: CAN 5411 of 2007

This is an application for expeditious disposal of the appeal. We have taken up the appeal for hearing today.

The application is, accordingly, disposed of.

Re: FA 124 of 2008

The appeal is arising out of a judgment and order passed by the learned Additional District Judge, 1st Court, Purulia in connection with an application for grant of letters of administration with the Will annexed to it. The learned Trial Judge dismissed the said application, *inter alia*, on the ground that the evidence of the scribe and the attesting witness and the various circumstances concerning the execution of the Will would show that the said Will is forged or fabricated.

The learned Counsel appearing on behalf of the appellants has strenuously argued that the learned Trial Judge has completely misdirected its mind in arriving at a finding that the attesting witness could not prove due

registration of the Will. It is submitted that the prayer of the appellants to produce another attesting witness was hastily turned down, as a result, the appellants were unable to prove the Will.

We have carefully read the judgment under appeal and the evidence on record. The appellants were denied the opportunity to prove the Will by another attesting witness although may appear to be attractive at the first instance on proper consideration and we have persuaded to hold otherwise. Apart from the fact that one of the attesting witnesses also appears to be the scribe, the appellant thought that he would be the best person to prove the genuinity and authenticity of the said Will. However, the scribe-cum-attesting witness has given evidence which raise grave suspicion with regard to the execution of this Will. If the evidence of the scribe to be scrutinized, it could be seen that the Will on which an application has been made for grant of letters of administration would not be the said Will at all.

In the Will, there is a recital that Himangshu Dutta is physically handicapped and mentally derailed and Sudhangshu Dutta was unemployed. Both of them have taken due care of their mother. It is difficult to comprehend that how a person who is physically handicapped and mentally derailed could look after her mother. There are more surprises for the appellants as it is admitted by the appellant No.2 that Himangshu got a job as railway staff in the year 2001 under the

handicapped category. Although it is not in the evidence frantic attempts have been made on behalf of the appellants to make us believe that the Will was registered on Commission. The said submission was made obviously with a view to reconcile the two dates appearing on the reverse of the first page of the Will. Much emphasis has been laid on the endorsement "V.C.T.I. Number". The said Will contains signature of all the brothers and sisters of the present appellants except Kishanlal Dutta but in different inks. It also mentions the scribe as an attesting witness. Admittedly, all the brothers and sisters of the present appellants have their separate mess and one of them, namely, Smt. Doli Rani Chell was residing at Purulia. There was no evidence to show that all of them came down at the time of alleged execution of the said Will. In fact, the objector has raised a very pertinent issue in its objection that all the attesting witnesses could not have been present on the date when it is alleged to have been executed or registered. The appellants claimed to have been residing with their mother. It is very difficult to accept that they would not be aware of the execution of an important document like Will and they would require a long seven years to discover the said Will from a Tin Box.

The learned Counsel has submitted that in the cross-examination, Sudhangshu has stated that his mother reported to both the brothers (one of whom is mentally retarded) one month prior to the death that there

is a Will in her trunk and “same may be taken after her death”. It took seven years for the two sons to trace out the Will from the Tin Box. It is highly unlikely that the appellants would not be aware of the brothers and sisters coming down to their residential house except Kishanlal for an occasion, namely, execution of the Will and they were only told by their mother one month prior to her death.

In exercising testamentary jurisdiction, the probate Court is required to be absolutely clear in its conscience that the Will has been voluntarily executed and it represents the last wish and desire of the testatrix. It was for that reason, the propounder is required to remove all suspicious circumstances surrounding the execution of the Will. The propounder is required to satisfy the conscience of the Court with regard to the execution, attestation and the testamentary capacity of the testatrix. The objector has stated that at the relevant time his mother was suffering from paralyse and was completely bed ridden. No medical evidence was produced to disprove the said fact. In fact, the scribe-cum-attesting witness was not declared hostile and he was not cross-examined in terms of Section 154 of the Evidence Act. It is true that an adjournment was prayed for to produce another attesting witness. The Court was completely exasperated by the conduct of the appellants. Without declaring the scribe as a hostile witness and without clearing the doubts which are reasonable and

suspicious in nature, we do not find any reason to interfere with the judgment passed the learned Trial Court.

Accordingly, the appeal being FA 124 of 2008 stands dismissed. L.C.R. along with the Will shall be sent down.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)