

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 46 of 2019
with
IA No.: CAN 1 of 2018 (Old No. CAN 6043 of 2018)

Arun Kumar Mullick & Another
versus
Debabrata Seal & Others

For the Appellants : *Mr. Sourav Sen,*
Mr. Soumen Das.

Hearing is concluded on : *24th February, 2023.*

Judgment On : **15th March, 2023.**

Tapabrata Chakraborty, J.

1. The present appeal has been preferred challenging the judgment dated 27th March, 2018 passed by the learned 3rd Judge, City Civil Court at Calcutta in O.C. Case No.22 of 2014 dismissing the application for grant of probate of

the Will made and published by one Chintamoni Mullick, in a contentious cause.

2. The application for grant of probate accompanied by an affidavit of assets was filed by Arun Kumar Mullick (in short, Arun) and by one Gour Gopal Mullick (in short, Gour) being the appellants herein stating *inter alia* that one Chintamoni Mullick (in short, Chintamoni) was the owner of the said assets and prior to his death on 13th December, 2002, he voluntarily executed a deed of Will on 11th December, 2002 and the same was notarized on the same date. Claiming the said Will to be his last Will, Chintamoni settled his right, title and interest in the assets in favour of Gour and Arun. The said Will was executed by Chintamoni in presence of two attesting witnesses, namely, Sri Samir Kumar Seal (in short, Samir), an advocate and Dr. Shyamal Kanti Mullick (in short, Shyamal). Arun and Gour were appointed as the joint executors. The said Will was written in Bengali language and was read over and explained to Chintamoni and thereafter, he put his Left Thumb Impression (in short, LTI) voluntarily in presence of the attesting witnesses. In the said application it was also averred that Chintamoni, a Hindu bachelor, was governed by the Hindu Succession Act, 1956 (in short, the 1956 Act). He expired on 13th December, 2002 and the names of the surviving heirs were detailed in paragraph 7 of the application.

3. Supporting the contents of the probate application, one Shibananda Mullick (in short, Shibananda), Chintamoni's step brother and one Gita Basak

(in short, Gita), his step sister submitted separate applications as consenting parties. However, Debabrata Sil (in short, Debabrata), Chintamoni's nephew and two nieces, namely, Chaitali Seth (in short, Chaitali) and Purnima Das (in short, Gita) filed a joint written objection stating *inter alia* that the Will was a fabricated one and that the same was prepared by the appellants after the death of Chintamoni for grabbing his property by putting false thumb impression of Chintamoni. At the time of execution of the alleged Will, Chintamoni was unconscious and bedridden.

4. On the basis of the pleadings the learned Court below framed the following issues :

- i. *Whether the case is maintainable in its present form and prayer ?*
- ii. *Did the testator, Chintamoni Mullick execute his last Will and Testament on 11.12.2012 in presence of the witnesses ?*
- iii. *Are the applicants entitled to get the probate of the last will and testament of Chintamoni Mullick executed on 11.12.2002 ?*
- iv. *To what other relief or reliefs, if any, are the plaintiffs entitled ?*
- v. *Was the deceased Chintamoni Mullick mentally alert and physically fit at the time of executing the alleged Will ?*

5. One attesting witness, namely, Samir, an advocate and one of the propounders, namely, Gour deposed as PW1 and PW2. The Will and the signatures were marked as Ext. 1 to 4, an authority letter dated 27th May, 2017 and the death certificate of Chintamoni were marked as Ext. 5 and Ext. 6

respectively. On behalf of the respondents, Debabrata deposed as DW1, the record-in-charge of J.N. Roy Sishu Seba Bhawan, Manicktala, namely, Dwiptendra Ghosh deposed as DW2. Upon contesting hearing and considering the materials on record the learned Court below dismissed the probate application observing *inter alia* that the circumstances surrounding the execution of the Will were shrouded in suspicion as the LTIs of Chintamoni in the Will were found to be overlapping and extended and that there was nothing on record to show that the executant ever asked the typist or the learned advocate to put a written endorsement in the last page of the Will. Samir, a learned advocate discharged almost all the important functions relating to the Will. The Court thereafter came to a finding that the appellants had failed to discharge the essential initial burden of proof and to dispel the doubts.

6. Mr. Sen, learned advocate appearing for the appellants submits that on the basis of a mere allegation in the written objection that the Will was a fabricated one, the learned Judge erred in law in dismissing the probate application failing to appreciate that it was incumbent upon the respondents to give the particulars of such fabrication with specific dates and events as per the provisions of Order 6 Rule 4 of the Code of Civil Procedure (in short, CPC).

7. He further submits that the LTI of Chintamoni was identified by the Samir, learned advocate, an attesting witness. The provisions of Section 63(c) of the Indian Succession Act stand satisfied as both the attesting witnesses had seen the testator to put his LTI and they have also signed the Will in

presence of the testator. Such fact was duly corroborated by Samir through his deposition. Thus, though the Will was executed in consonance with the provisions of Section 63(c) of the Indian Succession Act, the learned Judge glossed over the said issue and did not return any finding on the same and erred in law in dismissing the probate application.

8. According to him, the testator's thumb impressions did not extend over unnaturally to create any suspicion. The last LTI was found to be faint though from the original Will it would be evident that the said LTI was perceptible. The learned Court below ought to have appreciated that even if the testator was capable of writing but on account of weakness he was unable to put his signature, he could have executed the Will by affixing a mark. Such thumb impression does not cast any suspicion and there is no requirement to achieve any mathematical precision. In support of such argument reliance has been placed upon the judgments delivered in the cases of *Subhas Chandra Saha and Ors. -vs- Haridas Saha and Ors.*, reported in *AIR 2014 Cal 1*, *Ramabai Padmakar Patil (D) through LRs. And Ors. -vs- Rukminibai Vishnu Vekhande and Ors.*, reported in *AIR 2003 SC 3109*.

9. Mr. Sen argues that Chintamoni was not residing with the respondents. Such fact would be explicit from the deposition of Debabrata, DW1 wherein he categorically stated that '*it is a fact that we did not look after Chintamoni as we were residing elsewhere*'. In the Will itself Chintamoni had given appropriate explanation as to why he did not wish to grant any part of

his assets to the respondents. Reasonable explanation also emerges from the contents of the Will as to why the testator has given his entire property to Arun and Gour. It thus cannot be said that the Will was unnatural. The Will has to be understood by taking into consideration the circumstances that were prevailing at the relevant point of time and the same has to be construed from the mindset and desire of the testator. Chintamani was being looked after by the appellants and their family members and he was in the same mess with them and as such the disposition made in the Will cannot be construed to be improbable or unfair. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Birendranath Paul and Ors. –vs- Sankar Paul*, reported in *AIR 2015 Cal 272*, *Uma Devi Nambiar and Ors. –vs- T.C. Sidhan (Dead)* reported in *AIR 2004 SC 1772*, *Swapan Kumar Nandan –vs- Ram Kishore Duby and Ors.*, reported in *2008 (3) CHN 631*.

10. He contends that the learned Judge ought not to have drawn any negative presumption since the typist, namely, R.N. Mitra was not examined. The Court cannot impose its own standard of behaviour upon those who execute Wills, moreso when the Will had been executed in consonance with the provisions of Section 63(c). In support of such contention reliance has been placed upon the judgment delivered in the case of *Savithri and Ors. –vs- Karthyayani Amma and Ors.*, reported in *AIR 2008 SC 300*.

11. Heard Mr. Sen, learned advocate appearing for the appellants and considered the materials on record.

12. Records reveal that by an order dated 17th September, 2019 the application for injunction being CAN 2 of 2018 (Old No. CAN 6208 of 2018) was disposed of. By an order dated 22nd December, 2020 passed by a coordinate Bench of this Court, the application for additional evidence being CAN 6043 of 2018 was directed to be heard along with the appeal. By an order dated 5th March, 2021 it was noted that service upon the respondents was complete. In spite of service of notice, no one has appeared on behalf of the respondents.

13. The application being CAN 6043 of 2018, which has been heard along with the appeal, was preferred praying for leave to produce and rely upon the documents marked as Annexure-‘E’ to the application. The said documents are medical prescriptions of J.N. Roy Sishu Seba Bhawan, medicine bill, a biochemical report, a blood report and a visitor pass. The said documents had been issued during the period from 11th December, 2002 to 13th December, 2002. The learned Court below had already observed that it was the admitted case of both the parties that on 11th December, 2002, the testator was admitted in the hospital in the evening. In view thereof, there is no requirement to let in fresh evidence when even without such evidence this Court can pronounce the judgment. The said application is, accordingly, dismissed.

14. The intention of the testator has to be primarily ascertained by the Court from the totality of the facts and circumstances and the Court is entitled to put itself in the testator’s arm chair and to ascertain the intention of the

testator. From the evidence on record it transpires that Chintamoni was literate and could write and sign documents but the Will was executed obtaining his LTI. No plausible explanation is forthcoming as to why LTI was taken in the document when Chintamoni was literate. Such act does not appear to be normal and gives rise to suspicion.

15. The testator expired on 13th December, 2002, i.e., two days after the Will was allegedly executed on 11th December, 2002. There was thus a proximate nexus between the death of Chintamoni and the execution of the Will. It is a settled principle of law that when the respondents on the basis of the materials on record are able to expose suspicious circumstances, the burden shifts upon the applicants to dispel the doubts. In the present case the appellants could not successfully rebut the respondents' contention that the testator did not execute the Will out of his own volition and that he was not mentally alert and physically fit to know the consequences of execution of the said Will. The appellants have also not been able to dislodge the suspicion which has occurred from the sequence of facts revealing that Samir had performed three roles, i.e., he had signed the Will, he had identified the testator's LTI and had also signed the endorsement that the Will was read over and explained in Bengali to the testator. The doubt expressed by the learned Court below about the endorsement made in the bottom of the Will is also not without substance. The overlapping and extension of the thumb impressions of the testator in the document are visible to the naked eyes and the Will does not inspire confidence that the same is genuine.

16. In course of his deposition Samir had stated *inter alia* that he visited the house of Chintamoni only twice. The second visit was about one and half month after the first. On the first date he was asked by Chintamoni to draft a Will and accordingly the same was drafted and on perusal of the draft, the Will was typed. However, Samir could neither produce any draft Will nor could establish in any manner that Chintamoni had approved the contents thereof. Chintamoni's residence was also far away from Samir's chamber and as such the learned Court below arrived at a finding that the Will was not drafted on the date of Samir's first meeting with Chintamoni and the same was in fact placed before the executant on 11th December, 2002 itself.

17. Suspicion means doubt, conjecture or mistrust. Courts do not approach a Will with doubts but examine it cautiously and with circumspection. The allegations levelled against the appellant are neither bald nor pertain to mere skirmishes. The plentitude of contradictions, inconsistencies and the lack of adequate explanation of the lacunae leave cleavages creating suspicious circumstances surrounding the execution of the Will.

18. There is no dispute as regards the proposition of law laid down in the judgments upon which reliance has been placed on behalf of the appellants. However, a decision is an authority for what it decides and not what can logically, be deduced therefrom. Even a slight difference in fact or addition of fact may make a lot of difference in the 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. By its very nature, in a probate case, the facts cannot be similar and the dispute involves human issues which are always complex and complicated.

19. The judgment impugned reflects conscious application of mind and the findings arrived at by the learned Court below are fortified with appropriate reasons. We do not find any illegality or infirmity in the judgment of the learned Court below and we have no hesitation to accept the same.

20. We, accordingly, affirm the judgment dated 27th March, 2018 passed by the learned 3rd Judge, City Civil Court at Calcutta in O.C. Case No.22 of 2014 and dismiss the appeal, without any order as to costs.

21. The Lower Court records be sent back at the earliest.

22. 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.)