

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

BEFORE:

**The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar**

FA 146 of 2008

**Brojendra Nath Roy Chowdhury
Versus
Chittaranjan Ghosh and Ors.**

For the Appellants : Mr. Sabyasachi Chowdhury, Adv.
Mrs. Sohini Chakraborty, Adv.

Order dated : 16th March, 2023

Soumen Sen, J. (Oral): The appeal is arising out of a judgment and decree dated 20th September, 2006 passed in O.C. Suit No. 1 of 2002.

The appellant is aggrieved by the judgment passed by the learned Trial Judge in refusing to grant probate of the Will dated 23rd January, 1969 executed by one Basanta Kumari Ghosh, since deceased.

Briefly stated, Basanta Kumari Ghosh executed a Will on 23rd June, 1965 appointing Brojendra Nath Roy Chowdhury as sole executor of the Will. The executor is also the beneficiary of the assets of the testatrix. Basanta Kumari Ghosh died on 29th August, 1965. The executor earlier filed an application for grant of probate being probate case no. 74 of 1969. The said probate case was allowed by the learned District Delegate, Serampore on 27th June, 1970. One Surendra Nath Ghosh (predecessor in

interest of the original respondent no. 1(A), 1(B) and 1(C) along with others filed a suit being revocation case no. 6 of 1972 praying for revocation of the probate granted earlier. The learned Additional District Judge, 2nd Court, Hooghly on consideration of the fact that the applicants in the revocation case ought to have been cited as they would have succeeded were entitled to the estate of the said deceased but for the Will allowed the revocation application on 17th January, 1975.

In view of the aforesaid the plaintiff filed a fresh application being probate case no. 128 of 1997 before the learned Chief Judge, City Civil Court praying for grant of probate of the Will dated 23rd June, 1965 in which the original respondent on being cited filed written objection and upon the said probate case was marked as contentious cause it was renumbered as O.C. Suit No. 1 of 2002. The respondents in their objection have denied all the material allegations and it was specifically contended that Basanta Kumari Ghosh never had executed the Will under consideration nor any such Will was executed voluntarily. At the relevant time she was very sick and she was not in a position to execute the Will or dispose of her assets voluntarily. The alleged will is forged and fabricated for making wrongful gain. The said Will was manufactured and/or brought into existence by the plaintiff with an ulterior motive.

On the basis of the pleadings the trial Court framed seven issues.

The trial Court dismissed the probate suit, inter alia, on the ground that the propounder has failed to disclose the name of the scribe or that the

said Will was written in his presence. There is no indication in the Will that the said Will was read over and explained to the testatrix.

There are two attesting witnesses in the Will. One Pulin Behari Mazumder is the scribe-cum-attesting witness. Pulin Behari Mazumder died prior to the filing of the probate case. Pulin Behari Mazumder died on 31st March, 1990. The other attesting witness was not produced. According to the plaintiff he was present at the time of execution of the alleged Will and the two attesting witnesses alleged to have put their respective signatures on the Will in his presence. However, the learned trial Court was of the view that it was more of an excuse on the part of the plaintiff for not producing the other attesting witness and the explanation offered for not being able to produce the other witness Bhavatosh is not at all satisfactory. As the essential requirement for proving the Will by one of the attesting witnesses is not fulfilled, the will is not proved in accordance with law.

The present appellants are the legal heirs of the original executor/plaintiff.

Mr. Sabyasachi Chowdhury, learned Counsel appearing on behalf of the appellants have submitted that the Will is proved in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act. It is submitted that the Will is required to be proved by an attesting witness and in view of the fact that Pulin Behari one of the attesting witnesses was examined as an witness in the earlier probate case in which he had proved the due execution of the Will, the said evidence is

relevant and sufficient compliance of the aforesaid requirements of the law. Mr. Chowdhury submits that the learned trial Judge has completely overlooked the fact that the requirement of law contemplated under the aforesaid provisions have been fulfilled.

Mr. Chowdhury submits that there is no real challenge to the said Will. The objectors did not allege that the signature of the Will was forged or there was any undue influence or suspicious circumstances surrounding the execution of the Will. The allegations are general in nature and without any substance. Mr. Chowdhury referred to the deposition of Pulin Behari dated 2nd May, 1970 in the earlier probate proceeding and submits that the said attesting witness has clearly stated that he was the scribe and attesting witness to the Deed. The relevant portion of the evidence relied upon by Mr. Chowdhury reads:

Basanta Kumari ghose executed a Will. I scribed the deed. This is the Will written by Basanta Kumari gave instruction to write the Will. The Will was read over to her. After fully understanding the contents, she signed. I was also an attesting witness to the deed. The executants signed in presence of the witnesses. The witnesses signed in her presence. This is the Will. (ext.1).

It is submitted that this evidence clearly establishes that the Will was read over to the testatrix and after fully understanding of the contents the testatrix signed the Will. Pulin Behari signed the will in presence of the witnesses and the witnesses signed the Will in presence of the testatrix. Mr. Chowdhury submits that on the basis of the aforesaid evidence the Will

was marked as Exbt.1. This evidence has not been shaken in the subsequent proceeding. Mr. Chowdhury submits that in view of compliance of the aforesaid provisions the learned trial Court could not have come to the conclusion that there has been no due execution and attestation within the meaning of Section 68 of the Indian Evidence Act. Mr. Chowdhury submits that there was not even an iota of evidence on the basis of which the learned trial Court could have arrived at a conclusion that the Will was surrounding by the suspicious circumstances.

We have considered the pleadings, the evidence of the parties and the judgment under appeal. It is an admitted position that the parties who ought to have been cited were not cited when the probate was obtained earlier. The probate was revoked on 17th June, 1975. At the relevant time the scribe-cum-attesting witnesses was alive. Surprisingly after 22 years a fresh probate proceeding was filed with a prayer for grant of probate in favour of the propounder who also happens to be the beneficiary. No explanation has been offered for long delay of almost 22 years in filing the probate application. The delay has not been satisfactorily explained. If the executor was really interested to have the probate there was no reason for him to wait for almost 22 years to file a fresh case by which time the scribe-cum-attesting witness is dead. It is true that the scribe-cum-attesting witness was examined in the earlier proceeding and he was able to prove the Will in accordance with Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act. However, the said attesting witness was not cross-examined. By reason of the revocation of the earlier

proceeding the earlier probate perished. The propounder is the executor and the beneficiary. He appears to have taken a prominent role in the execution of the Will. It is presumed that the propounder would be knowing particulars and address of the attesting witness as he claimed to have been present at the time of execution and attestation of the Will. At the time when the probate case was filed the other attesting witness was not produced. It is a fate accompli for the petitioner as the Will is required to be proved by an attesting witness. He did not apply for issuance of any summons for appearance of the other attesting witnesses. If the propounder was actually present at the time of execution of the said will, it is expected he would have all details of the attesting witnesses. He did not explain the circumstances under which the said Will was executed. He did not produce any cogent evidence to show that the testatrix was physically fit and mentally alert at the time of execution of the Will. His evidence of being present at the time of execution of the Will cannot dispense with the requirement of the evidence of an attesting witness. In order to attract Section 69 of the Indian Succession Act it has to be satisfactorily proved that no attesting witnesses could be found.

In view of the fact that in the earlier proceeding the probate case was dismissed, the evidence of the scribe-cum-attesting witness would not be of much evidentiary value as the respondents did not have the opportunity to cross examine the said attesting witness with regard to his involvement at the time of preparation of the Will as they were not cited. In ***Chatoo Kurmi vs. Rajaram Tewari*** reported at **11 CLJ 124**, it was held

by a Full Bench of this Court, that it is the right of every litigant in a suit, unless he waives his right to cross-examine witnesses whose testimony is to be used against him. Mr. Chowdhury has submitted that the evidence of Pulin Behari proves the Will. We are unable to hold that the Will is proved since evidence of Pulin Behari has remained untested since he was not cross-examined. The said evidence would remain on record but its evidentiary and probative value is very weak for the reasons we have indicated above. There is another aspect of the matter. The original plaintiff could have filed the probate case soon after the revocation application was allowed and could have made a fresh attempt to prove the Will with the scribe-cum-attesting witness who was alive till 1990. It raises a serious doubt as to whether the scribe-cum-attesting witness was at all present at the time of execution of the said Will or that the said Will was executed voluntarily. It is trite law that the propounder is required to remove all legitimate suspicion before the document can be accepted as the last Will of the testatrix. Over the years in deciding probate cases the courts have evolved the test of satisfaction of the judicial conscience and that test emphasises that in determining the question as to whether an instrument produced before the court is the last Will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the Will has been validly executed by the testator.

If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him, but even in

the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.” [See. **S.R. Srinivasa v. S. Padmavathamma, 2010(5) SCC 274**].

In ***Bharpur Singh & Ors., v. Shamsheer Singh***, reported in **2009 (3) SCC 687** at Paragraph 16 has stated the following three aspects that must be proved by a propounder:

“16..... (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) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and (iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion.”

Thereafter, in paragraph 23, the Apex Court has narrated a few suspicious circumstance, as being illustrative but not exhaustive, in the following manner:-

“Suspicious circumstances like the following may be found to be surrounded in the execution of the Will: (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.*” (emphasis supplied)

In ***Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.***, reported in **(2006) 13 SCC 433** at paragraphs 34, 35 & 36 the Hon’ble Supreme Court reiterated the circumstances that could be considered to be suspicious in the following words:-

“34. *There are several circumstances which would have been held to be described by this Court as suspicious circumstances: (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will; (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; (iii) where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.*

35. *We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Courts in **Venkatamuni v. C.J. Ayodhya Ram Singh** reported in (2006) 13 SCC 449 wherein this Court has held that the court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved. The proof of a Will is required not as a ground of reading the document but to afford the Judge reasonable assurance of it as being what it purports to be. (emphasis supplied)*

In the instant case we are of the view that the Will is not proved in accordance with Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act. Moreover, the propounder chooses to let a long time elapse before he filed the second application for probate he is not entitled to any indulgence at the hands of the court. He has disabled himself to take the benefit of Section 69 of the Indian Evidence Act by his own conduct as by reason of the long inexplicable delay Pulin Behari claimed to be one of the attesting witnesses have died. The inordinate delay in applying for the probate for the second time naturally

gives rise to some suspicion. The propounder has also failed to remove the suspicion circumstances surrounding the execution of the Will.

The appeal fails. All interim order shall stand vacated.

However there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)