

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 72 of 2018

Manjula Ghosh & Another
versus
Anjan Ghosh & Another

For the Appellants : *Mr. A.C. Kar, Sr. Adv.,*
Ms. Sarmila Das.

For the Respondent No.1 : *Mr. Javed K. Sanwarwala,*
Ms. Farah Anjum,
Mr. Shariq A. Sanwarwala.

Hearing is concluded on : *13th February, 2023.*

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

Partha Sarathi Chatterjee, J.

1. Judgement dated 19.04.2017 passed by the learned Additional District Judge, 3rd Court, North 24 Parganas, Barasat in O.S. no. 32 of 2006, whereby direction was given to grant probate in respect of the last Will and testament executed by the testator on 12.05.1986, has been called in question in the present appeal.

2. Facts giving rise to this appeal, in brief, are follows :

- i) One Anjan Ghosh (in short, Anjan) filed an application under Section 276 of Indian Succession Act, 1925 (in short, Act of 1925) before the District Delegate, Barasat, which was registered as case no. 314 of 2004, *inter alia*, contending that Arabinda Ghosh, who died on 20.05.2002, having his permanent place of abode at Napara Kalibari Road, Barasat, North 24 Parganas executed his last Will and testament on 12.05.1986;
- ii) It was claimed that in the Will, which was a holograph Will, Anjan Ghosh was appointed as the sole executor and testator died leaving behind two sons including the propounder and one Ranjan Ghosh and two daughters namely, Manjula Ghosh and Ramala Das;
- iii) It was alleged therein that the Will was duly executed and attested and at the time of execution of the Will, testator was of sound and disposing state of mind and hence, the Will was fit to be probated;
- iv) On receipt of citation, daughters of the testator (hereinafter referred to as the appellants) impeached the Will by filing joint written objection and the proceeding became contentious in consequence and the same was referred to the Court of learned District Judge wherein it was renumbered as O.C. case no. 32 of 2006;
- v) Crux of the defence taken in the written objection is that Will was collusive, fraudulent and manufactured and testator had never executed such Will and the signatures appearing on the alleged Will were not of the testators and attesting witnesses were the yes-men of

the propounder and at the time of execution of the alleged Will, testator was old and hence, he was not physically fit and mentally alert and the testator did not execute the Will voluntarily and amounts lying in the name of their mother in the bank and post office, MIS have been included in the schedule of the Will and lastly, it was claimed that propounder is not entitled to get probate in respect of the alleged Will;

vi) Record reveals that in corroboration of the facts depicted in the application for grant of probate, propounder adduced oral testimonies of two witnesses including one attesting witness, namely, Kanai Kar and himself who were examined as PW-1 and PW-2 respectively and on the other hand, to resist the grant of probate, both the daughters of the testator deposed and were examined as DW-1 and DW-2;

vii) PW-1 proved the Will, marked as Ext.-1 whereas the respondents tendered one book, cover page of which was marked as Ext.-A and testator's signature appearing thereon was marked as Ext.-A/1 on admission;

viii) After closure of the evidence and after the case was fixed for argument, appellants had filed an application for comparison of the signatures appearing on the cover page of that book with the signatures of the testator appearing on the Will but the learned Court below by passing an order dated 10.05.2016 decided to hear the application at the time of argument of the case. Order dated 10.05.2016 has not been assailed in any higher forum;

ix) However, upon perusal of the pleadings and upon appreciation of the evidence of the respective parties, the learned Court below decided the proceeding in favour of the propounder and directed grant of probate in respect of the subject Will.

3. Aggrieved thereby, the appellants have preferred the appeal, *inter alia*, contending that the learned Court below erred in not considering that hand-writing appearing on the Will was not of the testator and learned Court below erred in not appointing any hand-writing expert to compare the handwriting and/or signature appearing on the Will with the signature appearing on the cover of the book and learned Court committed mistake in not considering that the attesting witness has failed to prove execution of the Will.

4. Mr. Kar, learned Senior Advocate appearing for the appellants argues that in the given case, contention of the opposite parties made in the written objection by the opposite parties has not been tested in cross-examination by the propounder and hence, such contention of the opposite parties shall be deemed to be admitted and in support of his such contention, he placed reliance upon a judgment delivered in the case of *Babulall Choukhani v. Caltex (India) Ltd.*, reported in *AIR 1967 Cal 205*.

5. Mr. Kar argues that execution, attestation, hand-writing and signature appearing on the Will were under challenge in the probate proceeding. Drawing our attention to some portion of cross-examination of PW-1, attesting witness, he contends that PW-1 himself admitted that PW-1 knew Anjan since 1958 which has lent support to the claim of the opposite

parties that PW-1 was yes-man of Anjan and he further argues that testator allegedly executed in 1986 and he retired from service in 1980 but PW-1 in his deposition has made false statement to the effect that at the time of execution, testator was head master of a school at Calcutta and as such, evidence of PW-1 cannot be relied upon and PW-1 himself deposed that Manjula, one of opposite parties would attend the testator for the last 20/21 years before testator's death and hence, it can be construed that testator was on good terms with his daughters and such relation cannot justify their deprivation made in the Will. He further argues that from the evidence of PW-1, it would be explicit that he did not apply his mind while putting his signature on affidavit-in-chief prepared by others and he asserts that evidence of PW-1 was inconsistent.

6. Mr. Kar with his excellent eloquence and erudition draws our attention to the relevant extract of a book styled as '*Suspect Documents*' written by Wilson R. Harrison and argues that many signatures are written with a continuous line without lifting the pen from start to finish but when pen is lifted but not replaced on a line, a hiatus occurs in a signature. Drawing our attention to the signatures appearing on the Will and signatures appearing on the cover-page of the book, he submits that there were three pen lifts being three hiatus in the signature put on the cover-page whereas in the first page of the Will, there was no hiatus and in the second and third pages thereof, there was only one hiatus each in the two signatures and he contends that PW-2 himself admitted in his evidence that signature of the testator appearing in page 2 of the Will, the word 'Ghosh'

slightly differs from other two signatures. He contends that in the cover-page of the book, signature of testator went upward whereas in the Will, signatures were straight. He strenuously argues that microscopic examination of the signatures of the testator appearing on the Will and cover-page of the book are required and hence, it was a fit case where direction was required to be given for appointment of hand-writing expert for comparison of the signatures of testator with his admitted signature. He submits that this Court can send the matter on remand or can refuse to grant the probate. To lend support to his contention, he placed reliance upon the judgments delivered in the cases of *Ishwardeo Narain Singh v. Smt. Kamta Devi & Ors.*, reported in *AIR 1954 SC 280* and *Ajit Ch. Majumdar v. Akhil Ch. Majumdar*, reported in *AIR 1960 Cal 551*.

7. In response, Mr. Sanwarwala, learned Advocate appearing for the respondent submits that other books on '*Suspect Documents*' particularly, books written by Russian authors speak otherwise and he argues that since, PW-1 could not say actual time of retirement of testator and since, PW-1 deposed that he knew Anjan since 1958, his evidence, which has otherwise been proved to be reliable, cannot be discarded and he vociferously argues that all the objections taken by the opposite parties are based on conjectures and surmises since both the opposite parties have admitted that they did not inspect the Will and he argues that opinion of hand-writing expert is not conclusive but merely an aid to the Court and Court is required to decide whether such assistance is required or not and he placed reliance upon a judgment delivered in the case of *Ajoy Kr. Das & Ors. -vs- Kalpana*

Das & Ors., reported in 2007(2) CHN 257 (Cal)(DB) for such proposition and he arduously argues that the learned Court below has rightly refused to entertain the application for appointment of hand-writing expert, which was filed at belated stage and he argues that learned Court below did not fall in error in granting probate. He submits that the subject Will being a holograph Will carries a presumption in favour of its genuineness and in support of his such contention, he referred to some authorities and the judgment delivered in the case of *Joyce Primrose Prestor (Nee Vas) v. Vera Marie Vas*, reported in AIR Online 1996 SC 55). He asserts that since execution and attestation of the Will have been proved and since, opposite parties therein had failed to discharge their burden that propounder or any beneficiary of the Will exercised undue influence upon the testator, propounder is entitled to get probate and hence, Court has rightly granted probate and in support of his such contention, he placed reliance upon a judgment delivered in the case of *Surendra Pal & Ors. -vs- Dr.(Mrs.) Saraswati Arora & Anr.*, reported in AIR 1974 SC 1999.

8. A Will must be proved having regard to the provisions contained in Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a Will must prove its execution by examining one or more attesting witnesses and the propounder must remove all the suspicious circumstances surrounding the Will and if the Will is impeached on grounds of fraud, coercion or undue influence, the burden of proof would be on the caveator to prove the same.

In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.

9. In case of *H. Venkatachala Iyengar vs. B.N. Thimmajamma*, reported in *AIR 1959 SC 443*, it was held that one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. In that case it was held that the propounder of 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) 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.

10. In the case of *Indubala Bose vs. Manindra Chandra Bose*, reported in *AIR 1982 SC 133* it was held that 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. As put by this Court, the suspicious features must be '*real, germane and valid*' and not merely the '*fantasy of the doubting mind*'.

11. It is trite that enumeration of suspicious circumstances cannot be made exhaustively. However, Court will see, i) as to whether signatures of testatrix were genuine or not, ii) as to whether she/he had sound disposing state of mind or not, iii) as to whether nature of disposition being unnatural tends to improbability and/or unfairness, iv) as to whether executor taking prominent part receiving benefits from Will or not etc.

12. 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.

13. In the given case, PW-1 both in affidavit-in-chief and in cross-examination, has deposed that attesting witnesses saw the executor to sign the Will and testator saw them to sign on the Will and he deposed that one of the attesting witness namely, Haradhan Mitra has died. This part of the evidence of the PW-1 has not been shaken and destroyed. Admittedly, in one portion of his evidence, PW-1 stated that at the time of execution, testator was head-master of one school and in another portion of his evidence says he could not recollect whether testator was in service in 1986.

14. If it is assumed that above portion of evidence that testator was in service at the time of execution of the Will is false then question is whether his entire evidence would be discarded. The maxim '*falsus in uno, falsus in omnibus*' (false in one thing mean false in everything) is neither sound rule of law nor a rule of practice and such maxim has no application in India and it is trite of law that even if major portion of evidence is found deficient, residue, if found trustworthy, can be relied upon. Moreso, even if this part of evidence is treated as contradiction, then it can be argued that minor contradiction which does not go to root of the case is not fatal.

15. Witness is interested only when he derives some benefit from the result of the litigation. It is well settled that even one trustworthy evidence cannot be thrown away on the ground of interestedness. PW-1 deposed that he knew Anjan since 1958 and such acquaintance itself will not make PW-1 as interested witness.

16. PW-1 deposed that at the time of execution, testator was of sound and disposing state of mind and admittedly, subject Will is a holograph Will and holograph Will carries a great presumption in favour of its genuineness [*See, cases of Joyce Primrose Prestor (Nee Vas) (supra) & Ajit Ch. Majumdar(supra)*].

17. The opposite parties took the plea that Will was forged and/or manufactured and on the other hand, they took the plea that propounder exercised undue influence upon the testator to get the Will executed. Such pleas are mutually destructive to each other. However, opposite parties could not bring any evidence to lead any prudent man to hold that Anjan was in a position to dominate the will of the testator and Anjan has used that position to get the Will the executed. It is to be noted that testator was head-master of one school and subject Will being a holograph Will was executed in 1986 and testator died in 2002.

18. Appellants herein made the application for appointment of hand-writing expert after closure of evidence and after the case was fixed for argument and learned Court below by passing an order dated 10.05.16 directed that such application would be heard at the time of argument of the case and such order has not been assailed in any forum and hence, such order has reached to its finality.

19. When a Court is to form an opinion as to whether any hand-writing or signature is of one particular person or not, then Court can form such opinion basing upon the evidence of the person acquainted with hand-writing or signature of that person or upon the evidence of person who has

seen that person to write or to sign and/or Court can call the expert's opinion in aid. In the case of *Ajoy Kr. Das (supra)*, it was ruled that opinion of hand-writing expert is not binding upon the Court and Court is not bound to ask for the opinion of hand-writing expert in each and every case. In the case at hand, PW-1 being one of the attesting witness has identified the signature of testator in compliance with the provisions of Section 68 of the Evidence Act.

20. Appellants themselves admitted that they have not inspected the Will and they have filed the application for appointment of hand-writing at a belated stage and considering such aspects, we do not find any irregularity and illegality in the approach of the learned Court below in refusing to ask for opinion of hand-writing expert.

21. When there is no opinion of the hand-writing expert, Court can rely upon the evidence of the person who had seen testator to sign and/or Court can seek guidance from some authoritative textbook and Court's own experience and knowledge.

22. In the case at hand, from the signatures of the testator appearing on the different parts of the Will and cover-page of the book, it will appear to any prudent man that testator was in habit of signing in different manner in different places and for that there were differences in pen-lifting and in hiatus. Probate in respect of such holograph Will whose execution and attestation have been proved by unimpeachable evidence and which is not shrouded with any suspicious circumstances, cannot be denied.

23. In the result, we do not find any cogent reason to interfere with the judgment impugned and consequently, the appeal fails and judgment impugned herein is affirmed.

24. There shall, however, be no order as to costs.

25. Let a copy of this judgment along with the LCR be sent down to the learned Court below at the earliest.

26. 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.)