

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present : Hon'ble Justice Rajasekhar Mantha
And
Hon'ble Justice Supratim Bhattacharya

F.A. No. 2 of 2013
With
I.A. No. CAN 4 of 2023
Sri Bijon Behari Dhar
Versus
Dipti Pal & Anr.

For the appellant : Mr. Amritlal Dhar,
Mr. Sarosij Dasgupta,
Mr. Avijit Dey.

For the respondent no.1 : Mr. Basudeb Gayen,
Ms. Pallabi Chatterjee.

For the respondent no.2 : Mr. Siddhartha Mitra, Id. Sr. Advocate,
Mr. Arnab Roy,
Mr. Soumitra Dutta.

Hearing concluded on : 26.07.2023

Judgement on : 01.08.2023

Rajasekhar Mantha, J:-

1. The appeal is directed against a judgement and order dated 13th July, 2012 passed by the learned Fourth Bench of the City Civil Court at Calcutta in O. C. No. 20 of 2006.

2. Originally an application under Section 278 of the Indian Succession Act, 1925 for Letters of Administration to the Estate of Late Prasadmoni Dasi was filed by Parul Bala Mallick and Juthika Pal the respondent herein. The said case was numbered as L. A. Case No. 21 of 2005.

3. On an objection being raised by Shri Bejon Behari Dhar, the appellant herein, alleging that Prasadmoni Dasi had executed her last will and testament on 12.12.2002, superseding the earlier will dated 20.11.1965.

4. L A Case No. 21 of 2005 was converted and registered as a suit being O. C. Case No. 20 of 2006. The application under Section 278 was treated as a plaint and the written objection was treated as a written statement by the trial Court's order dated 7th June, 2006.

5. The facts of the case are that Prasadmoni Dasi was a widow of late Kamala Kanta Dhar. She died on 27th July, 2004 at Premises No. 3A, Rup Chand Roy Street, P.S.-Barabazar, Kolkata-700007, West Bengal.

6. The Respondents/Applicants are the two daughters of Prasadmoni Dasi, namely Parul Bala Mullick and Juthika Paul. The Appellant/Objector, Bejon Behari Dhar, admittedly is the adopted son of late Prasadmoni Dasi and late Kamala Kanta Dhar. After the death of her

husband, Prasadmoni Dasi gifted and transferred some movable and immovable properties in favour of the Appellant/Objector, Bejon Behari Dhar.

7. On 20th November, 1965 late Prasadmoni Dasi executed and registered a Will in favour of her two daughters, the Respondents herein. In the said Will Parul Bala Mullick was given one property located at 1/30, Bipin Behari Ganguly Street, Kolkata. Two properties, situated and lying at 100/A and 100/B, Elliot Road, were bequeathed to Juthika Paul, her second daughter. The said Bijon Bihari Dhar, and Gaur Chandra Paul, their son-in-law, were appointed executors of the will.

8. Bejon Behari Dhar has given Rs.30,000/- payable to the testator under Suit No.3413 of 1954 in the High Court at Kolkata. A further sum of Rs.15,000/- being proceeds of an Insurance Policy has also been given to Bejon Behari Dhar.

9. As already stated, Bejon Behari Dhar was already been given a property at premises No.3A, Rup Chand Roy Street, Barabazar, Kolkata-700007 where the testator, her late husband, and the Objector, Bejon Behari Dhar, resided along with his family.

10. Upon the death of Prasadmoni Dasi, the two daughters, respondents herein, by letters dated 24th December, 2004 and 23rd

February, 2005 requested the surviving executor, the appellant herein, to take out a probate of the said Will dated 20th November, 1965. The appellant did not respond. As a consequence, the Respondents filed the application under section 278 of the said Act, seeking letters of Administration to the Estate of their late son. The appellant challenged the maintainability of the application under section 278 filed by the Respondents, inter alia, on the ground that the late Prasadmoni Dasi executed another Will on 12th December, 2002 that was registered on 17th December, 2002 with the office of the Additional Registrar of Assurances, Kolkata. The appellant also claimed that after execution of the second Will Prasadmoni Dasi sent letters dated 26th December, 2002 and 28th December, 2002 to the Respondent sisters enclosing therewith copies of the Will dated 12th December, 2002, which was subsequently registered on 17th December 2002.

11. In support of their prayer for letters of administration the respondents examined and proved the Will dated 20th November, 1965.

12. The Appellant has not seriously disputed such Will in the suit. The cross-examination on this score has also been rather half-hearted. The thrust of the case of the appellant was that the Will of 1965 has been revoked in and superseded by reason of the subsequent Will dated 12th December, 2002.

13. In support of the second Will dated 12th December, 2002 the appellant examined two witnesses. DW 1 was Bejon Behari Dhar and DW 2 was Shyamal Kumar Adak, an attesting witness. Three witnesses were examined on behalf of the respondent. PW 1 was Nirmal Kumar Dhar, an attesting witness of the Will dated 20th November, 1965. PW 2 was Juthika Paul/Respondent No.2 and PW3 was Parul Bala Mullick/Respondent No. 1.

14. The Court below found that the appellant had failed to dispel suspicious circumstances surrounding the second Will dated 12th December, 2002.

15. The Court found that the testator put her left thumb impression on the said second Will which is also written in the Bengali vernacular. In the first Will, dated 20th November, 1965 the testator had signed in English and the Will itself is written in the English language.

16. The Court below also found that the mental and physical health of the testator at the time of execution of the second will was not proved by the appellant. Letters of administration were granted and the objection was rejected.

17. Counsel for the appellant would argue that the second Will has been duly registered 5 days after its execution. The testator put her LTI in the

presence of the appellant and the witnesses. Shyamal Kumar Adak, one of the attesting witnesses to the Will, had deposed and proved his signature. The same accordingly to counsel for the appellant is sufficient to prove the existence of a Will and its execution. The Court below, therefore, erred in rejecting the vital evidence brought on record.

18. It appears from the evidence of Juthika Paul/PW 2 that the testator was about 80 years old at the time of the execution of the second Will. She had fallen down and had sustained fracture of her femur bone on 18th October, 2002. She was mentally and physically unsound. She was practically bedridden from the time of the fracture and could not have gone to the Registry Office for the purpose of execution and registration of the Will in question.

19. PW 2 has further stated she and her sister were not in talking terms with the appellant in the year 2002. They were prevented from visiting their mother. Even when they were able to visit their mother, they were not allowed to talk to her freely.

20. The respondent sisters, however, did not produce any document or evidence as regards the unsound physical and mental condition of the testator in December 2002.

21. On the contrary, there is evidence and proof that a letter was sent by on behalf of the testator along with the said registered Will dated 12th December 2002 to the respondents by the appellant. Postal acknowledgement Due Cards have been Proved by the appellant and exhibited in the Court below. Office copies of the letter without the LTI of the testator have been brought on by the appellant and exhibited in Court. The respondents have deposed that certain blank sheets of paper were sent along with the said letter. The letter admittedly weighed 30 grams, as per the postal endorsement. The respondent sisters, however, withheld the letters, and the annexures or copies of the Will or documents received by them.

22. The appellant denied in evidence that the testator was not of sound mind or health in December 2002 when the second Will was executed. One of the attesting witnesses who proved the second Will, has deposed that the first Will was prepared in the residence of the testator by an advocate, namely Tarun Kumar Chatterjee. The said Will was also stated to have been type-written and prepared in the house of the testator. Shyamal Kumar Adak was a goldsmith by profession who made ornaments on the instructions of the testator. He was asked by the testator to sign as a witness in the second Will.

23. The DW 2 also stated that the Will was witnessed by another person namely Dr. Binod Kumar Nivetia. The said Dr. Nivetia has not deposed in evidence in the suit.

24. This Court is inclined to draw an adverse inference, against the respondents, Parul Bala Mallick and Juthika Paul, for withholding the vital evidence of the original letter received with the Left Thumb Impression (LTI) of their mother and the annexures of the said letter being the first Will in question. However, the same by itself will not be sufficient to dispel any suspicious circumstances in the execution of the second Will.

25. The second Will appears to have been proved by reason of registration. What has, however, not come on record by oral and documentary evidence is the reason why Prasadmoni Dasi put her LTI on the Will despite being capable of signing in English language. In the year 1965, when the first Will was executed, Prasadmoni Dasi must have been around 40-45 years of age. It is presumed that she had elementary education and was at least able to put the signature in English language.

26. It is however true that a person at the age of 83-85 may have shaking hands by reason of a natural nervous disorder at such age. The testator was someone who wrote or read regularly or she may have learnt to sign and or write her name in English early in her life as most people in

her position in those days. At such an advanced age, she may have chosen to put her LTI on the 2nd Will. Her discomfort/probable inability in signing in English could have been a consequence of her fractured femur bone and her advanced age. The LTI put by the testator cannot itself impute a suspicious circumstance to the 2nd will, dated 12th December 2002.

27. While it has come from the oral evidence from DW 1 that Prasadmoni Dasi issued rent receipts to her tenants also with a LTI, no such rent receipts have been brought on record by the appellant. Curiously, enough there is no cross-examination or any assertion by any of the two daughters as regards their mother's ability to sign or as to why she put her left thumb impression instead of a signature on the Will in question.

28. In the case of **Misri Lal v. Daulati Devi**, reported in **(1997) 7 SCC 133**, at Para 10 it was held as follows -:

10. After going through the judgments of the trial court and the appellate court as well as the oral and documentary evidence placed before us, we are of the view that the High Court has not exceeded its appellate jurisdiction in reappreciating the oral evidence to upset the findings of the trial court. The learned Judge while dealing with the objection regarding the thumb impression has stated that it is not unnatural for an old person to prefer to put thumb mark instead of signature. In addition to that as we noticed earlier, the testatrix herself in executing the waqf deed in respect of other property has conveyed the title by affixing her thumb impression only. Therefore, the doubt regarding execution of the Will on the basis of thumb impression has been rightly overruled by the High Court.

29. There are mere casual statements in oral evidence, without any proof of the absence of sound mind or sound physical condition of the testator, by her daughters. There are no documents available to indicate the same. The objection of the respondent as regards the LTI of the testator on the second Will therefore cannot be accepted.

30. It is now well settled that it is for the appellant to dispel any suspicious circumstances in the execution of the second will. The Appellant/Objector has been able to prove the execution of the Will, inter alia, by its registration and the deposition of one of the attesting witnesses.

31. While it is true that the second witness, who was a doctor, has not been brought as a witness, it cannot be held that the Appellant/Objector has withheld such witness. The doctor is a third party, who may or may not want to have deposed. There is no evidence of his whereabouts that he was alive at the time when evidence was recorded in the Court below. There is no cross-examination or suggestion of the appellant by the respondent sisters as regards non-production of the doctor as evidence.

32. It has been argued by counsel for the respondents that the appellant, despite having brought the second Will as a defence to demolish the case of the respondents in the Court below which contained

that the first Will of 1965 stood revoked, the probate of the said second Will dated 12th December, 2002 has not been applied for.

33. Under normal circumstances, the appellant being an executor in both the Wills, ought to have applied for the probate of the second Will dated 12th December 2002. It is submitted across the Bar that an application for probate of the second Will has been filed after the instant appeal was filed.

34. Since it is now well-settled that an application for probate may not have a period of limitation within which it ought to be applied for, there cannot be any suspicious circumstances being inferred in that score against the second Will.

35. Section 68 of the Indian Evidence Act, 1872:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

36. In ***Rattan Singh Vs Nirmal Gill*** reported in **(2021) 15 SCC 300**,

the Supreme Court held at paragraph 33 as follows:-

“33. To appreciate the findings arrived at by the courts below, we must first see on whom the onus of proof lies. The record reveals that the disputed documents are registered. We are, therefore, guided by the settled legal principle that a document is presumed to be genuine if the same is

registered, as held by this Court in *Prem Singh v. Birbal* 2. The relevant portion of the said decision reads as below : (SCC pp. 360-61, para 27)

"27. There is a presumption that a registered document is validly executed. A registered document, therefore, *prima facie* would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."

(emphasis supplied)

In view thereof, in the present cases, the initial onus was on the plaintiff, who had challenged the stated registered document."

37. In ***Indu Bala Bose and Ors. Vs Manindra Chandra Bose and Anr.*** reported in (1982) 1 SCC 20, it was held at paragraph 7 as follows:-

"7. This Court has held that the mode of proving a Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations."

38. At paragraph 27 of the decision of the Supreme Court in ***Ishwar Dass Jain v. Sohan Lal*** reported in (2000) 1 SCC 434 it was held as follows:-

“27. We shall next refer to the vital evidence or facts relating to the mortgage which have not been considered by the courts below. The defendant admitted in his evidence as DW 2 that the mortgage deed was executed by him. The endorsement of the Sub-Registrar shows that the amount of Rs 1000 was paid as mortgage money. There is a presumption of the correctness of the endorsement made by the Sub-Registrar under Section 58 of the Registration Act (vide Baij Nath Singh v. Jamal Bros. & Co. Ltd. [AIR 1924 PC 48 : 51 IA 18]); it can be rebutted only by strong evidence to the contrary.”

39. The principles required to be borne in mind while dealing with registered wills, have been succinctly dealt with by the Supreme Court in paragraphs 8 and 9 in the case of **Madhukar D Shende v. Tarabai Aba Shedge** reported in **(2002) 2 SCC 85:-**

“8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in R. v. Hodge [(1838) 2 Lewis CC 227] may be apposite to some extent:

“The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.”

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict — positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

40. Applying the aforesaid dicta to the facts of the case, it is found that the appellant has been discharged the onus of proving the will by examining himself and one of the attesting witnesses. The sound mental and physical health of the testator has been proved both by the appellant and the attesting witness.
41. Admittedly both Prasadmoni Dasi and her late husband residing with the appellant till the date at no. 3A Rup Chand Roy Street, Barabazar, Kolkata-700007. The Appellant and his son were taking good care of the testator until the time of death. The desire of the grandmother to bequeath a property to her grandson out of love and affection is quite natural.
42. It is true that the appellant was already given the property in which he was residing with the deceased parents. By reason of the second will out of two properties given to Juthika in the first will of 1965, one has

been bequeathed to the grandson. A court while looking into suspicious circumstances surrounding a will does not assess the proportionality of the distribution of property by the testator.

43. What is however required to be addressed is the withholding of and non-disclosure of the letter dated 26th December, 2002 and 28th December, 2002 and the annexures thereto by the respondents in the court below. While they admitted having received the letters (since the postal A/D cards were on record), they have deliberately withheld the same by non-production.
44. It is now well settled that a person holding the best evidence must come forward and produce the same in a court of law. The disclosure of the documents would have produced the bonafide of the appellant as regards with the second will dated 12th December, 2002 and adverse inference under section 114 of the evidence act can therefore be drawn against the respondents.
45. In the instant case the appeal did not formally call upon PW2 and PW3 to produce the originals of the letters dated 26th and 28th December, 2002. If the assertion of the PW2 and PW3 that they received blank pages with envelopes. They have deliberately withheld the said documents from the court below. An adverse presumption and or inference under section 114 of the Indian evidence act, was therefore liable to be drawn against the respondents, the second will and its

contents and covering letter with LTI of the testator Prasadmoni Dasi were in fact sent and received by the applicant/respondent. This, therefore, is another factor to be considered in dispelling any suspicious circumstances in respect of the second will of the late Prasadmoni Dasi.

46. For the reasons stated hereinabove, this Court is of the view that the appellant has proved the second Will dispelling any suspicious circumstances. The respondents have not been able to demonstrate or establish the mental or physical incapacity of the testator while executing the second will dated 12th December, 2002. The first Will dated 20th November 1965 must be deemed or revoked by reason of the will dated 12th December 2002. No letters of Administration could have been issued in respect of the will dated 20th November 1965.

47. The dicta of the cases cited by Learned Counsel for the Respondents on the scope of authority of the First Appellate Court have been duly considered and this decision is not in conflict with the same. This Court has found and recorded sufficient reasons for reversing the conclusions and findings of the Court below.

48. The impugned judgement dated 13th July, 2012 is set aside. The Letters of Administration granted to the Respondents shall stand set aside.

49. F.A. No. 2 of 2013 is allowed and disposed of.

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

(Rajasekhar Mantha, J.)

I agree

(Supratim Bhattacharya, J.)