

11.01.2023
SL No.114
Court No.8
(gc)

FA 117 of 2008

**Prithiraj Prasad Saha @ Prithiraj Saha & Ors.
Vs.
Rajkumar Saha & Anr.**

Mr. Gour Baran Sau,
Mr. Arshad Hussain,
...for the Appellants.

Soumen Sen, J. (Oral): The appeal is arising out of a judgment and order dated 29th September, 2007 in relation to grant of probate of one Radhika Debi, since deceased. The appellant Nos.1 and 2 are the sons and the appellant No.3 is a sister of the testatrix. The legal heirs of the said appellant No.3 are brought on record after the death of the original appellant No.3. The Will was contested by the two other sons of the testatrix, namely, Rajkumar Saha and Srikumar Saha. The learned Trial Judge refused to grant probate on the ground that the executors have failed to remove the suspicious circumstances surrounding the execution of the Will – suspicious circumstances are the mental and physical health of the testatrix and the involvement of one, Gopal Prasad Saha, the husband of one of the sisters of the testatrix as an attesting witness. The evidence shows that the testatrix was separated from her husband and she was suffering from Cancer for almost one and half year before the execution of the Will. She was unable to take food and, we presume that she has also difficulty in expressing her as it had an oncological problem. The

Cancer had spread inside her mouth. Once such physical and mental condition have been established at the trial, it is for the propounder to prove that the testatrix at the relevant point of time was physically and mentally alert to execute the Will. The physical and mental alertness and consciousness of the testatrix could have been proved by the Doctor who was treating her and also by other witness and other evidence like prescription and medicine. These evidence would show that other brothers have not taken due care of their mother and it might justify bequeathing the property at least in his favour.

The appellants contended that it is a registered Will and, accordingly, a strong presumption should be attached to the due execution of the Will. There cannot be any dispute that a registered Will carries with it more weight of authenticity but unlike any other documents, the Will is required to be proved by the attesting witnesses in accordance with law and by the executor by removing all suspicious circumstances surrounding the execution of the Will. The registration of the Will by itself will not show that the testatrix carried with her the mind to execute this Will and bequeath the property in favour of two sons and one of her sister thereby excluding his other two sons.

The failure to prove the mental and physical condition of the appellant at the relevant point of time and that the testatrix was in a position to take an independent and impartial decision with regard to her disposition makes the execution of the Will vulnerable.

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.”

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.*

The court is required to come to a finding on the basis of the evidence that at the time of execution the testator was in a sound state of mind and the Will truly represents the testator's intention.

A registered document no doubt raises a presumption under Section 114 [Illustration (e)] of the Evidence Act to the effect that the events contained in the endorsement of registration duly performed and correctly recorded but it does not contemplate the factum of attestation within the meaning of Section 63 (c) of the Succession Act or Section 68 of the Evidence Act being certified by Registrar of the document. In this regard, we can place our reliance with profit in decision pronounced in **Bhagat Ram & Anr. vs. Suresh & Ors.** reported in **(2003) 12 SCC 35** wherein the Hon'ble Supreme Court held:-

"23. Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in one manner as provided in Section 68 of the Evidence Act. Under Section 58 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

(1) the date, hour and place of presentation of the document for registration;

(2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign of agent of any person, the signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and

(4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

24. Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by

Registrar along with his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 (Illustration (e) of the Evidence Act shall arise to the effect that the events containing in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds.”

It is interesting to note that she has excluded her two sons. The evidence of the scribe also does not inspire confidence as he was unable to show the circumstances under which the lady was brought to him. He also could not recollect the person who brought her for drafting the Will. The other attesting witness was also not know to him. She claimed to have on her own volition put her signature on the document. Although, the scribe has stated in the evidence that the lady having understood the contents of the documents put her signature, the presence of a person who is a convict can raise a suspicion about the execution of the Will voluntarily in absence of any other credible evidence.

We cannot shut our eyes from the attending facts surrounding preparation and execution of the Will where it appears that the appellant no.1 appears to have taken a lead role but he could not clear the conscience of the court by not producing the best evidence with regard to the due execution and attestation of the said Will.

Priththi Raj in his evidence did not say that he had accompanied his mother to the registration office or he

was present before the scribe/deed writer Binoy Kumar Ghosh at the time of preparation of the Will. It appears that Gopal Prosad Saha was present and he was interested in the property as he just completed the period of ten years and had no means of livelihood.

It is elementary that it is a duty of the executor to remove all suspicious circumstances surrounding the execution of the Will.

On the basis of the evidence on record, we are of the view that the Trial Court was justified in arriving at a finding that the executor has failed to remove all the suspicious circumstances surrounding execution of the Will. The probate court is a Court of equity and conscience. Unless conscience of the Court is clear, the probate Court shall not grant a probate.

On such consideration, we are not inclined to interfere with the order passed by the learned Trial Judge.

Under such circumstances, the appeal being FA 117 of 2008 stands dismissed.

However, there shall be no order as to costs.

L.C.R. along with the original Will shall be returned to the Trial Court by the department concerned.

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

I agree

(Uday Kumar, J.)

(Soumen Sen, J.)