

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 25 of 2021

Milan Das
versus
Sandip Das

For the Appellant : *Mr. Sudip Ghosh,*
Mr. Ashis Kumar Dutta.

For the Respondent : *Mr. S.M. Obaidullah,*
Mr. Roni Chowdhury.

Hearing is concluded on : *22nd February, 2023.*

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

Tapabrata Chakraborty, J.

1. The present appeal has been preferred challenging the judgment dated 1st February, 1999 passed by the learned District Judge, Howrah in Probate Case No. 03 of 2014 dismissing the application for grant of probate of the Will made and published by Netai Chandra Das, in a contentious cause.

2. The application for grant of probate accompanied by an affidavit of assets was filed by one Sri Milan Das (in short, Milan) stating *inter alia* that one Netai Chandra Das (in short, Netai) was the owner of the said assets and prior to his death on 20th June, 2003, he voluntarily executed a deed of Will on 7th January, 2023 and the same was registered on the self-same date. Claiming the said Will to be his last Will and testament, Netai settled his right, title and interest in the assets in favour of his only son, namely, Sandip Das (in short, Sandip) and his nephew, namely, Milan. The said Will was executed by Netai in presence of two attesting witnesses, namely, Uttam Das and Tapan Samanta and registered on the same date. The said Will was drafted by Sujit Bag, Advocate, Howrah Court and the same was typed by one Ashish Chakraborty, Howrah Court. Milan was appointed as the executor of the said Will. In the said application it was also specifically averred that Netai put his Left Thumb Impression (in short, LTI) on every page of the Will voluntarily, without any influence from any corner and in presence of the attesting witnesses and such LTI was identified by Sandip. Netai's wife, namely, Latika Das (in short, Latika) predeceased him and Sandip was their sole heir.

3. The probate application was contested by Sandip by filing a caveat and an affidavit in support thereof. In the said affidavit Sandip stated *inter alia* that Milan had no relation with Netai and was not an heir of Netai. Taking the advantage of acute mental and physical illness of Netai and the simplicity of Sandip, Milan prepared a Will by practicing fraud and misrepresentation.

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

- i. Is the present suit maintainable in its present form and prayer ?*
- ii. Has the Court jurisdiction to try the instant suit ?*
- iii. Whether the Will dated 07.01.2013 is genuine ?*
- iv. Whether the Will dated 07.01.2013 was obtained by fraud, coercion and importunity ?*
- v. Whether the testator had testamentary capacity at the time of execution of the Will ?*
- vi. Whether the Will was executed in accordance with Law ?*
- vii. Is the plaintiff entitled to get relief as prayed for ?*
- viii. To what relief or reliefs the plaintiff is entitled to ?*

5. The propounder deposed as PW1, the attesting witnesses, namely, Uttam Das and Tapan Samanta deposed as PW2 and PW3 respectively. One Partha Debnath was also examined as PW4. The propounder placed reliance and exhibited his original election identity card, the certified copy of a deed of partition dated 23rd October, 1973, certified copy of another deed of partition dated 13th May, 1983, original death certificate of the testator, the original death certificate of Latika Das and the original Will as exhibit nos.1 to 6 respectively. The left thumb impressions of the testator were marked as exhibit 6/1 series. Signatures were marked as exhibit 6/2, exhibit 6/3 and exhibit 6/4. Original Aadhar Card of PW4 was exhibited as exhibit 7.

6. The respondent and one Deepika Ray deposed as DW1 and DW2 respectively and the respondent exhibited medical report of the testator issued by District Hospital, Howrah as exhibit A and the original Aadhar Card of DW2 as exhibit B.

7. Upon contested hearing and considering the materials on record the learned Court below dismissed the probate application observing *inter alia* that *'physical and mental condition of the testator at the time of execution of the Will is not clearly explained. Time of execution of the Will is differently stated by different witnesses. P.W.4 read over the Will to the testator as "Dalil" not as a Will. The Petitioner, P.W.2 and P.W.3 stated that the Will was read over to the testator by the learned lawyer who drafted the Will. But no lawyer was present. P.W.4 is a clerk not a lawyer. It is not clear whether there was any misrepresentation in this regard. Disposition of property by the Will is not wholly natural. (5) The petitioner took active part in preparation of the Will and was present at the time of execution of the Will'*.

8. Mr. Ghosh, learned advocate appearing for the appellant/Milan submits that on the basis of a mere allegation in the written objection that the Will was a fabricated, false and manufactured one, the learned Judge erred in law in dismissing the probate application failing to appreciate that it was incumbent upon the respondent to give the particulars of fraud, misrepresentation with specific dates and events as per the provisions of Order 6 Rule 4 of the Code of Civil Procedure (in short, CPC).

9. He submits that the LTI on every page of the Will was identified by Sandip. The provisions of Section 63 (c) of the Succession Act stand satisfied as both the attesting witnesses deposed that they had seen the testator to sign and they have signed the Will in presence of the testator. 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 for alleged discrepancies as regards the time of execution of the Will. In support of such contention reliance has been placed upon a judgment delivered in the case of *Ganesan (D) Through LRs. –vs- Kalanjiam and others*, reported in 2019(4) ICC 96 (SC).

10. Mr. Ghosh argues that it is not a case that the testator had totally deprived his son from acquiring his property by the Will. Netai expressed his wish to give half of his property to Sandip though he was not satisfied about his conduct and was under an apprehension that he would misuse the property if he is given the entire property. Thus a reasonable explanation emerges from the contents of the Will itself as to why the entire property has not been given by Netai to Sandip. It thus cannot be said that the Will was unnatural and the learned Judge erred in law in dismissing the probate application. In support of such argument reliance has been placed upon the judgment delivered in the case of *Swapan Kumar Nandan –vs- Sri Ram Kishore Dubey & Another*, reported in 2008(3) CHN 631.

11. Mr. Ghosh submits that no material has been brought on record in support of the allegation that Netai was not physically fit and mentally alert at the time of execution of the Will. There is no proximate nexus between the death of Netai and the execution of the Will. The Will was executed on 7th January, 2013 and Netai expired on 20th June, 2013. The allegation that Milan had taken active part in the execution of the Will is also unfounded. Netai has distributed his assets equally amongst Milan and Sandip. Such facts do not lead to any suspicion and as such the learned Judge ought not to have dismissed the probate application. In support of such contention reliance has been place upon the judgment delivered in the case of *Sridevi and Others –vs- Jayaraja Shetty and Others*, reported in (2005)2 SCC 784.

12. Mr. Obaidullah, learned advocate appearing for the respondent submits that the appellant is neither an heir nor the nephew of Netai. In course of cross-examination, Milan has admitted that he is neither a son of any of the brothers nor of the sister of Netai. He also failed to produce any document to establish that he was a blood relation of Netai, the testator.

13. He argues that Sandip's mother, namely, Latika Das (in short, Latika) expired on 6th February, 2011, i.e., prior to the death of the testator and he is the only son of Netai and Latika and as such upon the demise of his father, the entire property of his father would have devolved upon him. At the time of execution of the Will, Netai was suffering from various ailments and taking advantage of such condition and misrepresenting him, Milan obtained the LTI

of Netai in a document purporting the same to be a power of attorney required for preparation of Netai's pension papers. Sandip had no knowledge about execution of any Will by his father and he came to know about the same only after a notice was served upon him from the learned Court below. Milan in collusion with the attesting witnesses, the scribe and the advocate had manufactured the Will taking advantage of Netai's ailments and the simplicity of Sandip. Such fact has been averred in the written objection and the same stands corroborated through oral evidence. It is trite law that the burden always lies on the plaintiff to make out and establish a clear case for grant of probate and the weakness, if any, of the case set up by the defendant would not be a ground to grant relief to the plaintiff. Mere skirmishes in relationship between Netai and Sandip after the demise of Latika, as alleged, cannot be construed as a reason for grant of a share in the assets to an alien.

14. He contends that the testator was an employee of Guest Keen Williams Limited and was conversant in English and Bengali language but it would be surprising to note that in the purported document no signature of Netai was obtained and the document was executed by obtaining the LTI of Netai. Why LTI was taken in the document when Netai was literate and when Milan himself asserted while deposing that Netai was not suffering from any ailments ? Such act does not appear to be normal and gives rise to suspicion.

15. In reply, Mr. Ghosh argues that the arguments advanced on behalf of the respondents are beyond the pleadings and as such no weightage can be

granted to the same. Sandip has admitted while deposing that he has studied upto Class IX and as such it is unbelievable that he would not be able to distinguish a power of attorney from a Will. No weightage can be granted to the deposition of D.W.2, who claimed to be the widow of Netai's friend, namely, Santosh Kumar Roy, an office colleague of Netai, who had expired on 21st June, 2004 and has appeared as a witness about five years after Netai's death.

16. Heard the learned advocates appearing for the respective parties and considered the materials on record.

17. 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 decide the *lis*.

18. Milan in course of his cross-examination stated *inter alia* that he had read up to Higher Secondary Level and Netai was his uncle, however, he was not a son of Netai's brothers/sister. He claimed that Netai was his father's maternal brother. He also failed to produce any document to establish that he had any blood relation with Netai. No explanation is forthcoming as to why the Will has been prepared obtaining the LTI of Netai when he was a literate person and was even fit enough to request Tapan Samanta to become a witness in the Will '*on road 2/3 days prior to the execution of the will*', as deposed by Tapan himself in course of his cross-examination.

19. Milan in course of his deposition had stated that along with Netai, he had visited '*the house of the Ld. Advocate (who drafted the will) five times*' and he stated that '*I have not yet filed the said draft Will but I shall file the same subsequently*' but he failed to produce the draft. Had the draft been prepared earlier, no explanation is forthcoming as to why the same was read over to Netai on the date of execution by the advocate's clerk.

20. The fact that Milan had an influence over Netai also cannot be ruled out since he had categorically deposed that he used to deal with Netai's family matters and property matters, used to intervene in the dispute between Netai and his son and acted as Netai's '*consultant and Netai Chandra Das used to do as per my advice*'.

21. Milan further deposed that execution of the Will was done by way of commission in the house of Netai at about 4:30 pm on the relevant date. Uttam Das in course of his cross-examination stated that the Will was executed on the relevant date at 6 pm. Tapan Samanta in course of his cross-examination stated that he put his signature in the Will at 4/5 pm. Partha Debnath as PW4 deposed that he read over and explained the Will to Netai and that he '*was not present at the time when the Will was drafted*' and that '*on the date of registration of the Will I went to the residence of the testator as per instruction of my learned advocate Sujit Bag. The time of registration was at about 8/8:30 pm*'.

22. Suspicion means doubt, conjecture or mistrust. 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.

23. It is well settled that a decision is an authority for what it decides and not what can be logically deduced therefrom. There is no dispute as regards the proposition of law as discussed in the judgments cited. 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.

24. 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.

25. We, accordingly, affirm the judgment dated 1st February, 1999 passed by the learned District Judge, Howrah in Probate Case No. 03 of 2014 and dismiss the appeal, without any order as to costs.

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

27. 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.)