

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

FAT 304 of 2019

Sujata Dhar
versus
Ranjit Kumar Dhar & Others

For the Appellant : *Mr. Probal Kumar Mukherjee, Sr. Adv.,
Mr. Siddhartha Goswami.*

For the Respondents : *Sk. Majnu.*

Hearing is concluded on : *24th February, 2023.*

Judgment On : **15th March, 2023.**

Partha Sarathi Chatterjee, J.

1. Judgment dated 30th March, 2019 passed by the learned Additional District Judge, 1st Court, Sealdah passed in O.S. no. 02 of 2016, whereby the application for grant of probate in respect of the Will and testament of one Rabindra Nath Dhar executed and registered on 27.02.1997 had been turned down, has been called in question in the present appeal.

2. One Sujata Dhar, claiming herself to be the executrix, filed an Act 39 case *vide*. No. 39 of 2015 before the District Delegate, Sealdah, *inter alia*,

contending therein that one Rabindra Nath Dhar, Hindu bachelor, having his permanent place of abode at 48, Sura East Road, P.S.-Belaghata, Kolkata -10 died testate on 14.11.2004 leaving behind three brothers and one sister.

3. Rabindra Nath Dhar (in short, testator) executed and duly registered his last Will and testament on 27.2.1997 bequeathing the property, detailed in affidavit of assets appended to the application, in favour of the applicant, Sujata Dhar who happened to be his brother's wife. It was claimed that original Will was lost and one general diary was lodged with local police station and propounder obtained certified copy of the Will from the office of the Registrar concerned and filed the same seeking grant of probate thereof. It was claimed therein that there was no impediment to grant of probate in respect of the Will and testament executed by the testator.

4. On receipt of citation, two brothers namely, Debnath and Pabitra and one sister, Arati Das (hereinafter referred to as, the caveators) resisted the grant of probate by filing common written objection thereby rendering the case as contentious cause. Ultimately, case was transferred to the learned Court below and renumbered as O.S. no. 02 of 2016.

5. In the written objection, caveators claimed that testator used to live in joint mess with his all brothers and testator had deep love towards all his brothers and sister and testator had no intention to execute any Will and it was asserted therein that the testator had never executed any Will on 27.2.1997 and the Will was forged and manufactured. Caveators instituted

one suit for partition which was transferred to the Small Causes Court of Sealdah and was renumbered as T.S. no. 99 of 2015 in which preliminary decree was passed on 29.6.2016 declaring that the share of testator has devolved upon all his legal heirs. It was further claimed that testator had no power to bequeath any portion of the joint property specifying one room therein and hence, no title was passed to the legatee by virtue of the Will and testament.

6. Upon pleadings of the respective parties, learned Court below framed as many as 7(seven) issues and in corroboration of the facts depicted in the application for grant of probate (in short, the application), the propounder examined herself and she also tendered oral evidence of one Sudipta Singha Roy, who was attached to the office of Additional District Sub-Registrar, Sealdah as UDC, one Subhranshu Bandopadhyay, who was the scribe and one Samar Kumar Roy, ASI of Police, who were examined as PW-1 to PW-4 respectively. PW-1 proved certificates of death of testator, of one Virendra Lal Kundu and also of one Rabin Dutta, certified copies of the deposition of Debnath Dhar and Pabitra Dhar (caveator nos. 2 and 3), tax bill of the house of parties thereto, copy of the Volume containing the contents of instrument no. 40 of 1997, certified copy of the Will, GD entry vide. No. 529 dated 6.8.2014 and certified copy of that GDE, which were marked as Ext.-1 to Ext.-8/1 respectively.

7. On the other hand, caveators adduced oral testimony of caveator no. 1 and they proved one letter dated 29.07.1996 allegedly written by testator to objector no.4, marked as Ext.-A.

8. Upon contested hearing, the learned Court below dismissed the application on the premise that in the case at hand, since both the attesting witnesses have died, Will was required to be proved by proving the signature of the testator as well as of one attesting witness in view of the provisions of section 69 of the Indian Evidence Act but propounder has failed to prove the signatures of testator and attesting witnesses thereby failing to prove execution and attestation of the Will.

9. Aggrieved thereby, appellant has assailed the judgment, *inter alia*, contending that the learned Court below failed to consider the evidence of PW-2, 3 and 4 and documentary evidence brought on record by the propounder and committed mistake in refusing to grant probate.

10. Mr. Probal Kumar Mukherjee, learned senior advocate submits that original Will was lost and husband of the propounder lodged one general diary on 06.08.2014 and one police personnel has proved the general diary and an employee from the office of Registrar concerned has proved the certified copy of the Will. Drawing our attention to the provisions of section 41 and section 42 of the Registration Act, 1908 he submits that Will is registered as per section 41 whereas Will is deposited as per section 42 of the said Act. In the former case, copy of the original Will is not available since the same is handed over to the person who presented the Will for registration or his representative on production of IGR and in the case of later, copy of the Will is kept. He argues that Court was required to presume that Registrar concerned registered the Will after being satisfied that Will was executed by the testator and he submits that in the given case,

Will was presented by testator himself which will be evident from the signatures appearing on the foot-note of certified copy of the Will.

11. He argues that scribe of the Will has proved the Will and drawing our attention to the oral testimony of one of the caveators, Pabitra Kumar Dhar (in short, Pabitra) adduced in the suit for partition being T.S. no. 99 of 2015, he submits that Pabitra being one of the caveators herein has admitted that the testator bequeathed his share in favour of the executrix. He also takes us to the deposition of DW-1, who in his cross-examination stated that *'Registry office came and proved the Will'* and *'... I have seen the Will'* and submits that the caveators have virtually admitted that there was a valid Will by executing which the testator had bequeathed his share to the legatee. He argues that considering totality of evidence, probate ought to have been granted. To buttress his argument he placed reliance upon the judgments delivered in the cases of *Ved Mitra Verma –vs- Dharam Deo Verma* reported in (2014) 15 SCC 578 and *Dhanpat –vs- Sheo Ram (deceased) thr. Lrs. & Ors.* reported in (2020) 16 SCC 209.

12. In reply, Mr. Majnu, learned advocate representing the respondents herein denies and disputes the contention of the appellant and submits that since the propounder could not prove execution and attestation in conformity with the provisions of section 69 of the Indian Evidence Act, 1872 (in short, Evidence Act) she is not entitled to get probate.

13. In the case at hand, Court is confronted with two peculiar situations being i) original Will has been lost and ii) attesting witnesses have died.

14. Section 65 of Evidence Act permits to let in secondary evidence of existence, condition or contents of a document if the absence of original document is accounted for.

15. Will was in the custody of the appellant's husband and the same was lost. He, accordingly, lodged a general diary with the local P.S. and that diary has been proved by the executrix and there was no cross-examination in respect of loss of original Will rather one of caveators, Pabitra Kumar Dhar while deposing in the suit for partition had admitted existence of the Will and an employee from the office of Registrar concerned has proved certified copy of the Will. No evidence has come that keeping the Will hidden, executrix and/or the propounder wanted to get any benefit. So, propounder has laid the foundation of leading secondary evidence being the certified copy of the Will. It is axiomatic that in case of loss of original Will, certified copy of the Will can be produced to prove the Will. So, in the case at hand, executrix can prove the Will by production of certified copy of the Will.

16. The second peculiar situation is that both the attesting witnesses have died and propounder has proved certificates of death of both the attesting witnesses. In case of availability of attesting witness, execution of the Will, which includes its attestation, is to be proved in the manner prescribed in section 68 of Evidence Act, 1872 but in case where attesting witness is dead or not found or not capable of giving evidence or not subject to the process of the Court, then execution of the Will is to be proved in the mode as required by section 69 of the Evidence Act which runs as follows :

Section 69. Proof where no attesting witness found: If no such attesting witness can be found, or if the document purports to have executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

17. Hence, in such case, handwriting of one attesting witness and of the person executing the Will are required to be proved. Handwriting or signature of any person can be proved –i) by calling the person who has seen the executant to write or sign, ii) by calling the person who is acquainted with the handwriting or signature of the person and/or iii) by way of scientific investigation i.e. taking recourse to the provisions of section 45 of the Evidence Act.

18. Since, attesting witnesses have died, the persons who had seen the testator to write or sign are not available and then execution was required to be proved by examining the persons who were acquainted with the handwritings or signatures of the one of attesting witnesses and of the testator.

19. It is to be noted that the Will was registered and not deposited in the office of the Registrar as per section 42 of Registration Act. So, copy of the original Will is not available and certified copy of the Will does not bear the signatures of the testator or attesting witnesses. Signatures of attesting witnesses and testator are not available for comparison or for being proved in the mode and manner described hereinabove. Basically, here, it is not possible to comply with the requirements of section 69 of the Evidence Act.

Mechanical approach in the sense that since the requirements of provisions of section 69 of the Evidence Act have not been fulfilled, propounder is not entitled to get the grant of probate cannot be appreciated. In case of *Ved Mitra Verma (supra)*, attesting witnesses had died and hence, persons acquainted with the signatures of one of the attesting witnesses and of the testator could not be brought but considering evidence of the Registrar who detailed the circumstances in which Will was executed and attested, the Hon'ble Court held that requirement of section 69 of the Evidence Act stands satisfied.

20. However, from the bottom portion of certified copy of the Will, it transpires that testator himself presented the Will for registration and there was no cross-examination on the issue that testator did not present the Will for registration or impression of signature of the testator appearing on the certified copy of the Will as a person presenting the Will is not of testator, which shall have an effect of admission on the part of the caveators.

21. PW-3, scribe of the Will has deposed that subject Will was scribed by him and he proved impression of his signature appearing on the certified copy of the Will and he denied the suggestion that testator had not approached him to scribe the Will on his behalf but admittedly, he did not state the circumstances under which the Will was executed and attested.

22. One of the caveators, Pabitra in his deposition given in suit for partition being T.S. no. 99 of 2015 makes this admission saying that '*it is fact that Rabindranath Dhar bequeathed his share in favour of wife of Ranjit*

Dhar'. In his evidence, DW-1 has deposed that '*he had seen the Will and Registry office came and proved the Will*'.

23. While giving answer to the query as to whether subject Will was genuine document or not, Court, which is a Court of conscience, shall make overall assessment of all facts and circumstances, evidence and unusual features appearing in the Will or unnatural circumstances surrounding the Will and then decide whether the Will sought to be propounded is the last Will of a free and capable testator or not.

24. Admittedly, no probate can be granted merely because the caveator consents to the grant. The Court has to be satisfied that the Will had been executed by a capable testator. In the case at hand, there is no evidence that there was such private arrangement to enable the propounder to get the grant. On cross-examination, one of caveators has admitted the fact that testator had bequeathed his share of the executrix by executing the Will. In case of *Dhanpat (supra)*, the Hon'ble Court's order is based on admission of caveator.

25. In the case at hand, original Will has been lost. Absence of original Will has been accounted for. General Diary and certified copy of the Will have been proved. Once the Will has been proved then the contents of such document are part of evidence. PW-3 has admitted that he had scribed the Will. One of the caveators, Pabitra has admitted that testator bequeathed his share by executing the Will. DW-1 had seen the Will and DW-1 admitted that '*Registry office came and proved the Will*'. Indisputably, probability is the not main thing to be considered in connection with the question as to

whether probate should be granted or not. The Court has to be satisfied whether the Will was, in fact, executed and if so executed, by a free, capable and willing testator. In the case at hand, no evidence has come that testator was not in sound and disposing state of mind and although caveators alleged that the Will was result of fraud and the same was manufactured but no evidence has let in to substantiate such allegation. Regarding the statement of caveator that testator had no authority to transfer his share from undivided property, it can be argued that in probate proceeding, there is no necessity for an enquiry whether the testator had title or whether the testator had authority to bequeath the property or not.

26. So, the cumulative effect of such evidence, admission of caveators, facts and circumstances of the case, contents of the Will are sufficient to satisfy the mind of a prudent man that testator executed the Will bequeathing his share to the propounder.

27. In conclusion, the appeal succeeds. Judgment impugned is set aside. Let a probate in respect of last Will and testament of Rabindra Nath Dhar, since deceased, executed and registered on 27.02.1997 be granted with the copy of the Will annexed upon completion of all formalities and upon payment of stamp duty.

28. The parties to bear their own costs.

29. Let a copy of this judgment along with LCR be sent down to the learned court below forthwith.

30. 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.)