

Ct. 14.07
No. 2023
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C.O. 2319 of 2016
Partha Pratip Bhattacharyya & Ors.
-Versus-
Indrani Goswami & Ors.

Mr. Tanmay Mukherjee
Mr. Sounak Bhattacharya
Mr. Souvik Das
Mr. K.R. Ahmed
Mr. Sounak Mondal
Mr. Rudranil Das **...For the Petitioners**

Mr. Sirsanya Bandyopadhyay
Mr. Rahul Kumar Singh **...For the Opposite Parties**

Affidavit-of-service filed by the petitioner is taken on record.

Being aggrieved by and dissatisfied with the order No. 73 dated 26th April, 2016 passed by the learned Additional District Judge, 5th Court, Krishnagar, Nadia in O.S. Case No. 26 of 2005, present application has been preferred under Article 227 of the Constitution of India.

The opposite party Nos. 1 and 2 herein initiated a proceeding for grant of letter of Administration of the last Will and Testament allegedly executed by one Nani Bhusan Bhattacharyya, since deceased on 19th May, 1958. The said proceeding became contentious. The petitioners are contesting by filing written statement. The petitioners state that the opposite party Nos. 1 and 2 herein filed an application before the Court below praying for marking the original will as an Exhibit. The petitioners state that they contested the said application by filing a written objection. By the impugned order learned Court below allowed the opposite partys' application and marked the original Will dated 19.5.1958 as Exhibit 3/1.

Mr. Tanmay Mukherjee, learned Counsel

appearing on behalf of the petitioners submits that the original Will dated 19th May, 1958 has not been proved in accordance with law and the Court below has exercised its jurisdiction illegally and with material irregularity by marking the said Will as an Exhibit only on the ground that the said Will dated 19th May, 1958 is a registered one. He further contended that in their written objection against the plaintiffs prayer for marking the said Will as an exhibit, the opposite parties / petitioners took specific plea that Section 63(c) of the Succession Act have not been followed to prove the Will along with Section 3 of the Transfer of Property Act. Furthermore, while the said Will was Exhibited, the proviso laid down in Section 68 of the Indian Evidence Act were also not followed.

His further case is that in their written objection against the main probate application, they have categorically challenged the execution of the said Will in paragraphs 8, 9 and 10 of their objection. He further contended that PW 2 who is no way connected with alleged execution and registration, has suddenly appeared before the court and deposed that he was present at the time of execution and registration of the Will and he had seen the attesting witnesses to put signatures on the deed and the deed writer was known to him which is not believable. Learned court below ought not to have relied upon the deposition of said PW 2 and marked the documents as an Exhibit.

Mr. Sirsanya Bandyopadhyay, learned counsel appearing on behalf of the opposite parties referred the evidenced of PW 2 and contended that PW 2 has categorically stated in his evidence that he was present at that time in the house of Nani Bhusan Bhattacharya along

with Narsingha Prosad Bhattacharya , the deed writer who after writing the said will had read over and explained the contents of the will to Nani Bhusan Bhattacharya, who executed the said will by putting signature on all pages in his presence and also in presence of deed writer and three attesting witnesses. Accordingly, there is nothing to disbelieve the evidence of PW 2 and the court below was justified in marking the said document as Exhibit. In this context, he relied upon paragraph 13 of the decision in the case of *Ved Mitra Verma vs. Dharam Deo Verma* reported in (2014) 15 SCC 578. He also relied upon paragraph 19 of the decision in the case of *SangramSingh Premsingh Thakur Vs. Sarlabai w/o Chhotelal Thakur* reported in (2015) 2 Mh.L.J 488.

Mr. Bandyopadhyay also referring Section 69 of the Evidence Act contended, when witness has stated that he had seen the deceased testator to put signature on every pages of the will, then there is no reason to disbelieve the testimony of the witness on the facts and circumstances of the case. In this context he also referred paragraph 13 of the decision in the case of *Wilma Levert Canuao and Ors. Vs. Allan Sebastian D'Souza and Anr.*, reported in (2013) SCC Online Bom 720.

Having heard learned Counsel appearing on behalf of both the parties, it is clear that initially when the deposition of PW 1 and PW 2 were recorded the said documents was not marked as Exhibit and subsequently on 20th April, 2016 the opposite parties herein made an application before the Court below for marking the original Will as Exhibit. The objectors also filed written objection. The Court below observed that the objection raised by the objectors that no such Will has been executed by Nani

Bhusan Bhattachary is not tenable. When the original Will has been produced by the petitioners and the same is a registered document so the Court below observed that presumption of genuinity always lies in favour of the petitioner as regards existence of the will as well as its execution. Accordingly, the Court below relied upon the evidence of PW 2 who stated that he was present at the time of execution of the will and who has seen the witnesses and the executant to put the signature on the will and accordingly he has marked it as an Exhibit.

Having considered the facts and circumstances of the case it appears that the petitioner nowhere stated in his application about the fact that this witness namely PW 2 was all along present at the time of registration or he has seen the execution or registration of the Will or he has seen executant and all attesting witnesses to put signatures on the Will.

Learned Counsel appearing for the petitioners / objectors submits that in absence of such pleading they did not get the opportunity to controvert the allegation that PW 2 was all along present during execution and registration of document. In the cross-examination of PW 2 they have put categorical suggestion to the said witness that said PW 2 was not present at the time of alleged execution of the Will of Nani Bhusan Bhattacharya and they have also denied in the cross-examination any relationship of the said witnesses with the Deed-writer. PW 2 also admitted that he has no document to show that he used to work with the Deed-writer Nrisingha Prosad Bhattacharya.

Procedure to be followed by Trial Court at evidence-taking stage, upon any objection is raised regarding

admissibility of any material or any item of oral evidence were the subject matter of consideration before the Supreme Court in ***Bipin Shantila Panchal Vs. State of Gujrat and Another*** reported in (2001) 3 SCC 1, wherein Apex Court's observation and procedure laid down in this context may be quoted in this context : -

12. As pointed out earlier, on different occasions the trial Judge has chosen to decide questions of admissibility of documents or other items of evidence, as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. The worse part is that after passing the orders the trial court waited for days and weeks for the parties concerned to go before the higher courts for the purpose of challenging such interlocutory orders.

13. *It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.*

14. *When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make*

it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

Considering the facts and circumstance of the case if the observation of the Court below is to be accepted that since the Will is a registered Will, so it's execution always presumed to be genuine then nothing remains in the present proceeding to adjudicate. In fact such practice of passing detailed order either upholding or overruling objections raised at the evidence-taking stage regarding admissibility of any material or item in oral evidence has been seriously deprecated by the Apex Court.

In such view of the matter, the order impugned is interfered to the limited extent that the said Will which has been marked as "Exhibit 3/1" shall be marked as "Exhibit 3/1 (with objection)" and the issue relating to admissibility of document and evidentiary value of the said Will, shall be kept open for adjudication at the time of final hearing of the proceeding without being influenced by any observation made herein.

The revisional application, being C.O. 2319 of 2016 is thus disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)