

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 65 of 2023
FAT 327 of 2016

Ramen Kumar Paul & Another
versus
Jayanta Paul & Others
(Pratima Rani Paul, since deceased)

For the Appellants : *Mr. Mukteswar Maity,*
Mr. Vinay Misra,
Mr. Sumotro Das.

Hearing is concluded on : *4th April, 2023.*

Judgment On : **28th April, 2023.**

Partha Sarathi Chatterjee, J.

1. The present appeal is directed against the order *vide*. No. 43 dated 5th April, 2016 passed by the learned Additional District Judge, Fast Track Court no. 2, Barasat, North 24 – Parganas in O.S. no. 03 of 2012 (New O.S. No. 223 of 2014) whereby the learned Court below dismissed the suit *ex*

parte denying to grant of probate in respect of Will and testament of one Amulya Kumar Paul dated 18.2.2002.

2. One Ramen Kumar Paul and one Arbind Pal (hereinafter referred to as the petitioners) filed an application under Section 276 of Indian Succession Act, 1925 (in short, Act of 1925) before the Court of learned District Delegate at Barasat, which was registered as Misc. Case no. 197 of 2010 (Probate), praying for grant of probate in respect of last Will and testament of one Amulya Kumar Paul (hereinafter referred to as the testator) contending, *inter alia*, that the testator breathed his last on 2.12.2009 at his permanent place of abode leaving behind his widow, one son and three daughters, namely, Pratima Paul, Jayanta Paul, Rina Paul, Bina Saha and Rita Paul and prior to his death, the testator by executing his last Will and testament dated 18.2.2002, which was duly registered in the office of Additional Registrar of Assurance, Kolkata on 18.2.2002, bequeathed the property mentioned in the schedule appended to that application.

3. Jayanta Paul (in short, Jayanta) entered his appearance in Misc. case no. 197 of 2010 and resisted the grant of probate rendering the case as contentious cause. Consequently, the case was placed before the learned District Judge, North 24 Parganas and ultimately, the same was transferred to the learned Court below for disposal and was registered as O.S. no. 03 of 2012 and subsequently, the same was renumbered as O.S. no. 223 of 2014.

4. Crux of defence taken in his written objection by Jayanta is that Will was a fraudulent Will and testator had never executed any such Will and testator was completely ill both mentally and physically at the relevant

of time of execution of the alleged Will and the petitioners being the sons-in-law of the testator with ill motive misrepresented and insisted the testator to sign the Will, if the Will at all bears the signature of the testator.

5. Records reveal that although Jayanta filed written objection but ultimately, he did not contest the suit and accordingly, the suit proceeded *ex parte* against him.

6. Records further reveal that Pratima Paul, Rina Paul and Rita Paul, widow and two daughters of the testator respectively consented to grant of probate by filing an application supported with affidavit.

7. To substantiate the facts depicted in that application, petitioners adduced oral accounts of Ramen Kumar Paul and of one Biswajit Ghosh, who were examined as PW-1 and PW-2 respectively and original Will and certificate of death of the testator were produced and admitted in evidence as Ext.-1(a) and Ext.-2.

8. Learned Court below refused to grant probate on the premise that it is not proved that each of the witnesses had signed the Will in presence of the testator. Aggrieved thereby, the petitioners has impugned the order, *inter alia*, on the grounds that the learned court below did not consider that Section 68 of Indian Evidence Act has been duly complied with and PW-2 deposed that both the witnesses put their signatures in the office of Registrar concerned and learned Court below fell in error in refusing to grant probate.

9. Mr. Maity, learned advocate for the appellants argues that provisions of Section 63 (c) of Act of 1925 and Section 68 of Indian Evidence Act, 1872 have been duly complied with and both the witnesses had attested the Will in the office of Registrar concerned yet the learned Court below erroneously held that attestation has not been proved and he argues that three legal heirs of the testator gave no objection to grant of probate and Jayanta used his opposition to that application for grant of probate but ultimately, he did not contest the suit yet the learned Court refused to grant of probate. He asserts that the subject Will is fit to be probated.

10. Section 63 (c) of Act of 1925 mandates that the Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

11. So, Section 63(c) of Act of 1925 requires – i) that the witnesses shall see the testator –a) to sign or b) to affix his mark to the Will or c) the witnesses shall see some other person to sign the Will, in the presence and by the direction of the testator or d) the witnesses are to receive from the testator a personal acknowledgment of his signature or mark or the

signature of some other person; - and ii) each of the witnesses shall sign the Will in the presence of the testator.

12. In the case at hand, testator himself signed the Will. So, to form a valid attestation, - i) testator was required to sign the Will in presence of the witness and ii) both the witnesses were required to sign the Will in presence of the testator.

13. Admittedly, attestation implies something more than the mere putting down of a signature on a Will in the presence of the testator by a person who has been the testator sign. It means signing a document for a particular purpose and the purpose is to testify to the signature of the testator. In other words, witnesses are required to sign the Will *animo attestandi* i.e. with the animus and/or intention to attest the Will and it is not putting signature on a document *alio intuitu*. Basically, attestation means the signing of a document to signify that the attester is a witness to the execution of the document. So, another requirement of proper attestation is that witnesses are required to sign the Will with an intention to attest the Will and it goes without saying that legislature did not prescribe any form of attestation.

14. Section 68 of Indian Evidence Act lays down that 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 and it goes without saying that Will is a document which is required to be attested and as per proviso of

Section 68 of Evidence Act, even if the Will is registered, yet to prove its execution, at least one attesting witness is required to be examined.

15. Questioned Will is registered Will and two witnesses attested the Will and PW-2, one of attesting witnesses in his affidavit-in-chief (paragraph-3) stated that he was one of the attesting witnesses of the subject Will dated 18.2.2002 executed by the testator and except him another witness Sri Ranajit Kumar Basu signed on the said Will as witness and in paragraph- 5 thereof, he stated that he and the testator put their signatures in the office of the Registrar and testator put his signature in his presence and testator saw him to sign.

16. Rule of appreciation of evidence denounces the practice of culling out one line isolation from the evidence and to base the judgment on such isolation statement. Entire evidence of one witness is to be considered as a whole. From the entire evidence of PW-2, it is reflected that the testator and two witnesses were present in the office of Registrar at the time of execution and registration of the Will and PW-2 deposed that both the witnesses signed the Will as witnesses i.e. with the *animus* to attest the Will and there are repetitive judgments on the issues that if it is proved that testator or the witnesses were present in the same room and/or place and had a clear view of each of them when they were in the act of signing, it is not necessary for the witnesses or the testator to witness the movement of fingers of each of them.

17. Considering the evidence brought on record and on close scrutiny of the pleadings of the respective parties and considering facts and

circumstances of the case at hand, we are of the view that petitioners have successfully proved that the Will was validly executed and duly attested and from the evidence and circumstances, no material has come up to lead us to hold that Will was shrouded with suspicious circumstances and that the petitioners have failed to remove those suspicious circumstances.

18. Hence, we hold that petitioners are entitled to get probate in respect of the last Will and testament of the testator.

19. In conclusion, the appeal succeeds. Order impugned is set aside. Suit is allowed. Let a probate be granted in respect of the Will executed and registered on 18.2.2002 by the testator, Amulya Kumar Paul, since deceased with the copy of the Will annexed, in accordance with the law and upon payment of requisite court fees.

20. The appeal is, accordingly, disposed of.

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

22. 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.)