

04-09-2023
ct no. 13
sl. no. 33
pk

F.A. No. 139 of 2013
IA No. : CAN 1 of 2023 (Not in File)
Sri Sambhunath Ghosh and others
-Versus-
Smt. Nilubala Ghosh and others

Ms. Kakali Samajpaty,
Ms. Sangita Jangra,
Mr. Subhranil Ray

...for the appellants.

Re: CAN 1 of 2023 (substitution)
(Not in file)

1. CAN 1 of 2023 has been filed to seek substitution of the appellant no. 1, Sri Sambhunath Ghosh, who died on 28. 03. 2023.
2. The legal heirs of the deceased Sambhunath Ghosh are Maya Ghosh, Wife, Prasanta Ghosh, Son, Tapas Ghosh, Son, Karuna Ghosh, Daughter, Mithu Ghosh, Daughter and Aparna Ghosh, Daughter, who may be substituted in place and stead of the deceased appellant no. 1, Sambhunath Ghosh.
3. We direct the Registry to record the death of the appellant no. 1/Sambhunath Ghosh and substitute the name of the persons mentioned in the substitution application in stead and in place of the deceased appellant no. 1 forthwith.

4. The Registry shall carry out necessary amendment in the cause title. Abatement of the appeal, if any, shall stand set aside.
5. The application for substitution being CAN 1 of 2023 shall stand allowed and disposed of.

Re: F A 139 of 2013

1. None appears on behalf of the respondents.
2. This appeal is directed against judgement and order dated 21.12.2012 passed by the learned Additional District Judge, 6th Court, Barasat in O. S. No. 65 of 2006.
3. The original appellants are three brothers, who had filed an application for probate under Section 276 of the Indian Succession Act, 1925 being Misc. Case 52 of 2006. The probate was sought of the will dated 7th March 1995 of their late father Dhananjay Ghosh, who died on 26.04.1995. Curiously the deceased did not name the appellants/petitioners as executors.
4. Upon notice being served on the natural heirs, who would have inherited the estate of late Dhananjay Ghosh, objections were filed. Misc. Case No. 52 of 2006 was converted into a Suit being O. S. No. 65 of 2006.

5. In the purported will, which has been registered, the deceased stated to have bequeathed his properties to his three sons i.e. the original appellants.
6. The defendants being nos. 1 to 9 were Nilubala Ghosh, wife of late Dhananjay Ghosh, Sunil Ghosh/another son, Asima Ghosh/daughter, Radhika Ghosh/daughter, Smt. Shyamalika Ghosh/daughter-in-law, Santosh Ghosh/son-in-law and three grandsons, namely, Bablu, Bapi and Sanaton Ghosh.
7. The defendant no. 2 filed a separate written statement claiming that there was another will of the deceased, in his favour, in respect of other properties.
8. The defendant nos. 1 and 3 to 9 filed a joint written statement claiming that the deceased was mentally disturbed for at least five years before his death. In fact, he died after the will was executed on 26.04.1995 by committing suicide.
9. The Court below framed six issues, two of which are vital and necessary for the consideration of the instant appeal i.e. issue no. 3, whether the testator was mentally and

physically fit to execute the will and whether the will was registered by impersonation. The Court below received several documents in evidence and exhibited the same. On behalf of the appellant, two witnesses were examined, namely, Kamal Ghosh (PW1), a beneficiary, and attesting witness, Ranjit Bhattacharya (PW2). On behalf of the defendants, Nilubala Ghosh as the wife of the deceased evidence.

10. The Court below heard the submissions of the learned counsel for the parties and found that the will was made under suspicious circumstances, and the propounders were not able to dispel the same. The Court also found that the application for probate could not have been maintained by the appellants since they are not named executors. However, the application was not dismissed and was converted into one for letters of Administration.
11. The application for letters of Administration was dismissed by the Court below finding the following suspicious circumstances :

- (a) Although PW1 had stated in his examination-in-chief that he was present when the will was executed, he

contradicted himself in cross examination when he said that he was not present. He however had given a vivid description of the execution of the will of the deceased.

(b) The deceased did not name or even mention the existence of his wife, Nilubala Ghosh in the will. A testator of a will normally either reserves some portions of his property with some interest for his wife or indicates as to why he wishes to deprive. In the instant case it is seen that the wife was not even mentioned in the will. Admittedly, the deceased enjoyed good relations with the wife, who took care of him even in sickness.

(c) The Court below found that the testator did not have the mental capacity to execute the will as admittedly he was attempting suicide repeatedly. He was being treated for mental illness and was on medication.

(d) The Court, however, found that the attesting witness had not stated that he has seen the testator signing the

documents and he has also not mentioned where exactly the document was executed. PW2 in his cross-examination said that the deceased was alone on the date the will was prepared. There is evidence of the presence of the lawyer and other witnesses are on the date of alleged registration.

12. On a conjoint reading of the evidence on record, the Court below found that the witnesses did not put the signatures on the document on the date of its execution i.e. 07.03.1995. They put their signatures on 10.03.1995 when the document was actually registered. The Court below considered several cases of this Court and the Hon'ble Supreme Court, namely, the case of **Bharpur Singh and others Vs. Shamser Singh** reported in **(2009) 3 SCC 687** as regards the responsibility of a propounder of a will to dispel suspicious circumstances. A decision of this Court in **Shibani Sadhukhan Vs. Anil Sadhukhan** reported in **2010 SCC OnLine Cal 1570** was also considered.
13. This Court, therefore, finds that the Court below had applied all the relevant and

necessary tests for deciding an application for probate and/or Letters of Administration.

14. Further reasons and facts have been given by the Court below that have not been mentioned in this decision.
15. This Court is fully satisfied that the original appellants have not been able to dispel the suspicious circumstances surrounding the purported will dated 10.03.1995.
16. The judgement and decree passed by the Court below therefore cannot be faulted and is wholly sustainable both in fact and law.
17. For the reasons stated herein above, the instant appeal is dismissed.
18. In view of dismissal of the appeal, connected application, if any, is also dismissed.
19. Interim orders, if any, shall stand vacated.
20. There will be no order as to costs.
21. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)

