

04.10.2023.
Item No. 2.
Court No. 1
ap

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CIVIL APPELLATE JURISDICTION
(Appellate Side)

F.A. No. 2 of 2019
Arising out of
F.A.T. No. 5 of 2019

Nanigopal Das
Versus
Paromita Das & Ors.

Mr. Bhaskar Roy Mahashaya,
Mr. Sannidhya Dutta.

....For the appellant.

1. The appeal is directed against the judgment and order dated 11th January, 2019 passed by the learned District Judge, Jalpaiguri in O.C. Case No. 01 of 2016 (Smt. Paromita Das – Vs. – Nanigopal Das & Ors.).
2. An earlier Bench has recorded that the respondents have not appeared despite notice.
3. By the impugned judgment, the Court below granted Probate of the last Will and Testament of Smt. Amala Das, wife of Late Harkumar Das. Amala Das was 81 years of old when she executed the Will and Testament dated 12th March, 2017. She died later on 13th June, 2014.
4. Upon the application being made for Probate under the Indian Succession Act, it was cited. The deceased testator has one son and five daughters. The son, namely, Nanigopal Das is the objector. The other daughters are Gouri Dutta Majumder, Anjali Das,

Nilima Das, Dipali Dey and Paromita Das (propounder).

5. By the said Will, the testatrix bequeathed five decimals of land in favour of Paromita Das, the propounder. The land was in occupation of the objector, namely, Nanigopal Das.

6. The said Will was in the English language and prepared by the Lawyer, namely, Mr. N. Majumdar and typed by Mr. Biplab Chaudhury, the scribe. The objector/appellant's case was that the testatrix resided with him at Alipurduar. The Will was stated to have executed at Alipurduar in presence of the attesting witness, namely, Gouri Dutta Majumder, another daughter of the testatrix.

7. The principal ground of objection raised in the Court below by the appellant are as follows:

- (a) The testatrix resided with the appellant. She did not have the mental or physical capacity to execute the Will.
- (b) The testatrix was incapable of understanding the contents of the Will.
- (c) The Will was a type-written in English, whereas the testatrix signed in Bengali.
- (d) The death certificate of the testatrix was not produced before the Court.
- (e) The Will was procured by fraud and collusion.

8. On behalf of the respondents, two witnesses deposed. PW-1 was the propounder herself, namely, Kalpana Das and the PW-2 was the attesting witness her sister, Gouri Dutta Majumder, daughter of the testatrix. On behalf of the appellant, there was only one witness i.e. Nanigopal Das himself.

9. Based on the pleadings, the Court below framed the following issues:

“(a) Is the present case maintainable in its present form and in Law?

(b) Did the testator Amala Das execute the Will under consideration voluntarily?

(c) Is the Will under consideration genuine or forged one?

(d) Is the plaintiff/petitioner entitled to get the Probate of the Will under consideration?

(e) To what other relief/reliefs, if any, is the plaintiff/petitioner entitled?”

10. The Court analyzed the evidence and found that the Will was duly executed since the attesting witnesses and the propounder had said that the Will was executed and signed in their presence. PW-1 also stated that the testatrix of sound, mental and physical health.

11. The appellant deposed that the Will was a result of fraud and collusion and the testatrix was not in a physical or mental capacity to execute any document.

12. No documents were, however, produced to demonstrate the absence of mental or physical

capacity to execute any document or to demonstrate the absence of mental or physical capacity of the testatrix. There was no other oral evidence of any other person produced by the appellant to demonstrate such incapacity of the testatrix.

13. In the backdrop of the above, this Court is of the view that the propounder respondent, namely, Kalpana Das has been able to discharge her burden of proving due execution of the Will. The Will was prepared in English by the Advocate, namely, Mr. N. Majumdar, who has indicated that it was read over and explained to the testatrix.

14. The learned Counsel for the appellant would argue before this Court that Gouri Dutta Majumdar (PW-2) had stated that the testatrix was educated and well-versed in English. She, therefore, could not have signed in Bengali. It is secondly argued that no detailed reasons have been given to explain why the other legal heirs have been deprived by reason of the Will. It is further submitted that had the Will been executed in the house of the appellant, he would have definitely come to know of the same. It is also submitted that the propounder herself did not state that the testatrix was of sound mind and understood the contents of the Will.

15. This Court has carefully considered the evidence on record and the submissions of the learned Counsel

for the appellant. The first thing that strikes this Court is that the Will was attested by another daughter, namely, Gouri Dutta Majumdar and the two other daughters have filed written statement in the Court below that they have no objection to the grant of Probate in respect of the Will.

16. These facts lend a substantial credence to the wish and Will of the testatrix to execute the Will and bequeath the five decimals of land to Kalpana Das, another daughter.

17. Given the fact that the Will itself says that the son of Nanigopal Das and other daughters except Kalpana Das were well-established, there could be a presumption that the propounder, namely, Kalpana Das was not as well established as the others.

18. When a bequest under a Will is made to a daughter, the suspicious circumstances may exist on such score.

19. In a recent decision dated 21st September, 2023 passed by the Hon'ble Supreme Court of India in ***Civil Appeal No. 3351 of 2014 (Meena Pradhan & Ors. – Vs. – Kamla Pradhan & Anr.)***, the Hon'ble Supreme Court relying upon several decisions including the decision of ***H. Venkatachala Iyengar v. B.N. Thimmajamma***, reported in ***1959 Supp (1) SCR 426*** has laid down the following principles for valid proof of a Will.

“10. Relying on **H. Venkatachala Iyengar v. B.N. Thimmajamma**, 1959 Supp (1) SCR 426 (3-Judge Bench). **Bhagwan Kaur v. Kartar Kaur**, (1994) 5 SCC 135 (3-Judge Bench). **Janki Narayan Bhoir v. Narayan Namdeo Kadam**, (2003) 2 SCC 91 (2-Judge Bench). **Yunam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh**, (2009) 4 SCC 780 (3-Judge Bench) and **Shivakumar v. Sharanabasappa**, (2011) SCC 277 (3-Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

- i. The court has to consider two aspects: firstly, that the Will is executed by the testator and secondly, that it was the last Will executed by him.
- ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.
- iii. A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:
 - (a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a Will;
 - (b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;
 - (c) Each of the attesting witnesses must have 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 such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

iv. For the purpose of proving the execution of the Will at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence shall be examined.

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator.

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with.

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence.

viii. Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will, sound, certain and disposing state of mind and memory of the testator at the time of execution, testator executed the Will while acting on his own free Will.

x. One who alleges fraud, fabrication, undue influence etcetera has to prove the same. However,

even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

xi. Suspicious circumstances must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind'. Whether a particular feature would qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstances raising suspicious legitimate in nature would qualify as a suspicious circumstances for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit etc."

20. Applying the aforesaid principles, apart from Gouri Dutta Majumdar and other witnesses, namely, Nilima Das and another daughter of the testatrix has not deposed in evidence. Nilima Das and Anjali Das, daughters of the testatrix have filed a written statement in the Court below on 14th August, 2014 that they have no objection to grant of Probate.

21. This Court is of the view that the execution of the Will by the testatrix has been proved beyond doubt. There are no suspicious circumstances surrounding creation of the Will.

22. In so far as the understanding of the Will written in English by the testatrix is concerned, the signature of the Advocate, namely, N. Majumdar, on the Will

indicates that it was read over and explained to the testatrix.

23. It is abundantly clearly from the above that all the daughters of the testatrix have directly and/or indirectly, proved the existence, execution and validity of the Will as also the mental capacity of the testatrix.

24. The appellant has failed to bring any document to dispel the mental and physical capacity of the testatrix in execution of the Will.

25. The other inconsistency is pointed out by the learned Counsel for the appellant that the denial by Kalpana Das that her mother Amala Das did not reside with the older brother are not really material to the case. There is no infraction of the principles laid down in Meena Pradhan's case (supra).

26. The impugned judgment and order dated 11th January, 2019 granting Probate of the last Will and Testament of Amala Das dated 12th March, 2007 in favour of Kalpana Das, therefore, cannot be faulted. The said decision is upheld.

27. With the aforesaid observations and the discussions made hereinabove, F.A. No. 2 of 2019 shall stand dismissed.

28. Interim order, if any, shall stand vacated.

29. There will be no order as to costs.

30. 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.)