

03.10.2023
Court No.1
Item No.10

**HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI**

**FAT 12 of 2019
With
CAN 1 of 2019
With
CAN 2 of 2019**

**Kalpana Roy
Vs.
Jharna Roy @ Jharna Roy Sarkar and Ors.**

Mr. Bikramaditya Ghosh
Mr. Hillol Saha Podder

... For the Appellant.

Mr. Arijit Ghosh

... For the Respondents.

1. The matter was listed in the warning list since last week.

2. The appeal is directed against a judgment and order dated 13.03.2019 passed by the learned Additional District Judge, 1st Court at Cooch Behar in Title Suit No.1 of 2001.

3. By the impugned judgment the application for probate filed by the executor of the Will of one late Upendra Nath Roy, her father-in-law was rejected.

4. Originally an application for probate was filed by the appellant under the Indian Succession Act, 1925. Upon citations being issued the same was converted into a suit.

5. The suit was decreed ex parte on 21.01.2009. This was recalled at the instance of the respondents and was thereafter dismissed on contest.

6. The brief facts of the case are that one Upendra Nath Roy is stated to have executed a Will dated 06.09.1996 at the age of 85. The Will was registered before the Sub-register Office at Sitalkuchi. The testator was at the relevant point of time living with his eldest son Sunil Roy and daughter-in-law, beneficiary Kalpana Roy. The testator died on 31st May, 1998. He had two sons and five daughters. He had given all his daughters in marriage during his life time spending a lot of money. His two sons were earning and well-settled. Binu Roy, wife of the deceased and five daughters contested the Will.

7. On behalf of the defendants there were three witnesses, namely, wife, Binu Roy OPW -1, second one was Ajijar Miya OPW -2 and his son Rohimuddin Miya OPW -3. OPW 2 and 3 were neighbors and local residents. None of the other daughters or other son came to depose in the proceedings. In effect they did not seriously contest the proceedings.

8. It appears from the evidence on record on behalf of the objectors that the wife Binu Roy did not live with the testator for a substantial period of time before his death. She had instituted proceedings

against her husband for alleged torture and for maintenance. The petitioner was living for his safety with the elder son Sunil Roy and was being taken care of by his elder daughter-in-law, the propounder Kalpana Roy.

9. There was clearly bad blood between the testator and his wife. It is not therefore unusual or unnatural for the testator to bequeath his properties to his elder son who was taken care of him and his elder daughter-in-law, the propounder of the Will, who was also tending to her father-in-law.

10. The evidence on behalf of the propounder is clear and explicit. The Will has been proved by two attesting witnesses namely PW 2 and PW 4. In addition thereto the scribe and the deed writer were PW 3, namely, Akhimuddin. Kalpana Roy herself deposed as PW 1. The execution of the Will has been proved beyond any doubt.

11. In the backdrop of the above facts, the finding of the Court below that the executor was bedridden and ailing and could not have travelled from the residence of the elder son at Sitalkuchi to the Sub-register office distance two and half kilometers away, cannot be sustained.

12. There is no evidence on record as regards the medical condition of the testator or his incapacity.

Hence the presumption that must follow that the testator was capable of going to the Sub-Resitrar's office to execute the Will.

13. The Court below appears to have entirely swayed away by the evidence of the estranged wife of the testator Binu Roy.

14. Given the bad blood between the testator and his estranged wife which has been admitted by the wife of the testator in course of cross-examination as also in the evidence-in-chief, no credence whatsoever ought to have been given to such evidence by the Court below.

15. This Court, therefore, does not find any suspicious circumstances, for the propounder of the Will to dispel.

16. The impugned judgment dated 13.03.2019 is, therefore, liable to be set aside.

17. The last Will and testament of Upendra Nath Roy dated 06.09.1996 has been proved and a probate shall be granted therefor.

18. The instant appeal is allowed and disposed of.

19. There shall be no order as to costs.

20. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)