

IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY AND INTESTATE JURISDICTION
ORIGINAL SIDE

TS 13 of 2005
PLA No. 22A of 1971
(Arising out of Probate Case No. 14 of 1960 of the Learned
Court of District Delegate, 24 Parganas at Alipore)
IN THE GOODS OF :
SMT. MAKHAN RANI DUTTA (DEC) –
AND
IN THE MATTER OF BASUKI NATH DUTTA & ORS.
-VS-
ARABINDA DUTTA & ORS.

Before : The Hon'ble Justice Apurba Sinha Ray

For the Plaintiff : Mr. D.S. Mullick, Adv.
Mr. B.N. Jaiswal, Adv.
Mr. T.N. Pal, Adv.

Heard on : 16.09.2022, 19.09.2022, 16.11.2022, 02.12.2022,
05.01.2023, 03.02.2023, 15.03.2023

CAV On : 25.04.2023

Judgment On : 11.07.2023

Apurba Sinha Ray, J.:-

(1) The suit has a chequered history.

(2) On January 21, 1957 one Makhan Rani Dutta being a widow and issueless, executed an unregistered Will. On April 1, 1957, the said Makhan Rani Dutta died. On March 3, 1960 Baidyanath Dutta and Chandranath

Dutta, being the Joint executors under the said Will, made an application for granting probate before the Learned District Delegate, 24 Parganas at Alipore, which was numbered as Probate Case No. 14 of 1960.

(3) After service of citation upon the relatives of the deceased, Amulyanath Dutta, Biswanath Dutta and Sachindranath Dutta jointly lodged caveat challenging the prayer for grant of probate before the District Delegate, 24 parganas at Alipur and filed affidavit in support of such caveat. Another relative, Satyendranath Dutta also filed separate caveat along with supporting affidavit. As the matter became contentious, proceedings were transferred to the Learned Court of District Judge, 24 Parganas for adjudication.

(4) However, on 6th July, 1961 a notice of motion was taken out by the joint executors under clause XXIIA of Letters Patent for transferring the said case from the Learned Court of District Judge, 24 Parganas to the Hon'ble High Court at Calcutta. By an order dated August 8, 1961 the Hon'ble High Court directed the Learned District Judge, 24 parganas at Alipore to transfer the said proceeding pending before it to the Hon'ble High Court and accordingly, records of probate proceedings were transmitted to the Hon'ble Court in or about 1971 and the matter was re-numbered as PLA Case No. 22A of 1971.

(5) In the month of April, 1977 one caveator Amulyanath Dutta died and on January 17, 1988 another caveator, Biswanath Dutta also died. The

Other caveator, Satyendranath Dutta died on March 23, 1990 leaving behind his heirs and legal representatives who were duly substituted in the proceeding. On February 18, 1991 an application was made by the joint executors for substitution of the names of the heirs and legal representatives of the deceased caveators and His Lordship Hon'ble Justice Prabir Kumar Mujumdar allowed the substitution and directed the necessary amendments by striking the names of the deceased caveators and inserting the names of their heirs and legal representatives. The said order of His Lordship was carried out accordingly.

(6) By an order dated December 18, 1995 Her Ladyship, the Hon'ble Justice Ruma Pal (as Her Ladyship then was), discharged the caveats lodged by Amulyanath Dutta, Biswanath Dutta and also the affidavit filed by Satyendranath Dutta. The caveat lodged by Satyendranath Dutta continued to remain pending for adjudication.

(7) On November 17, 1999 Baidyanath Dutta, one of the joint executors died and thereafter on March 9, 2000 the remaining executor, Chandranath Dutta also died. On August 11, 2004 the beneficiaries under the last Will of Makhanrani Dutta, inter alia, made an application as administrators for recording the death of both the executors and substituting the names of their heirs and representatives. On August 25, 2004, the said application was allowed by the Hon'ble Justice Subhrakamal Mukherjee but such order could not have been carried out as requisite records were not available in the department.

(8) Accordingly the petitioners made an application for reconstruction of records and also for granting leave to the petitioner to carry out the amendments and substitution in terms of the direction of His Lordship, Hon'ble Justice Subhrakamal Mukherjee. On September 27, 2005 the said application was heard by the Hon'ble Justice Soumitra Sen who directed the department to reconstruct the record and to give effect the consequential amendment by converting the application for amendment of probate to an application for grant of letters of administration, as directed by the Hon'ble Justice Subhrakamal Mukherjee.

(9) On November 16, 2005 the concerned department carried out the amendments and the case was converted into testamentary suit being No. 13 of 2005. On July 9, 2008 some heirs and legal representatives of the caveators were directed to be substituted by His Lordship Hon'ble Justice Sanjib Banerjee. On January 17, 2009 Hon'ble Justice Soumen Sen fixed the suit for discovery of documents, inspection and also for making judges' brief of documents and correspondences within four weeks and that order was complied with.

(10) On July 7, 2022 the matter was mentioned before His Lordship the Hon'ble Justice Rabindranath Samanta for placing the suit for hearing in His Lordship daily list and accordingly on July 20, 2022 the suit came before the Hon'ble Justice Rabindranath Samanta when the prayer for participation made by the grandson of Satyendranath Dutta who died long ago was considered and rejected by the Hon'ble Court. Thereafter the suit

was fixed for witness action and two witnesses, namely Sri Basukinath Dutta and Sidhartha Kr. Mukherjee, were examined as PW1 and PW2 respectively and the following documents have been marked as exhibit:-

1. Power of attorney Ext – A
2. Original death certificate of Makhanrani Dutta Ext – B
3. Sradh Ceremony Invitation card Ext. C
4. Original Death certificate Biadyanath Dutta Ext. D
5. Original Death certificate of Chandranath Dutta Ext. D-1
6. Original signature of Annada Kumar Mukherjee one of the attesting witnesses in the Will was proved and marked as Ext. E.

(11) During argument the learned Counsel Mr. D. S. Mullick appearing for the petitioner has submitted that the instant matter was pending since 1960 and more than 62 years have gone by but the parties are unable to get justice. In fact, some of the erstwhile petitioners have already been died during pendency of the instant proceeding and the present petitioners being the legal heirs of the beneficiaries are entitled to the letters of administration as prayed for.

(12) The learned counsel has submitted that from evidence on records and documents disclosed in the suit, the executor-cum-beneficiaries appointed in the Will did not take any part in the execution of the Will of the testatrix. None of the executors were present in the bedroom of testatrix where the Will was signed and executed. Therefore it is to be presumed that when she realised that her days were numbered, the testatrix with her own initiative

arranged for execution of the Will so that the executors-cum-beneficiaries under her will whom she reared up and who looked after her at her old age, get her properties and asset, and not her husband's near relative who distanced themselves and remained away from her during the relevant time.

(13) The learned Counsel has further argued that it is an admitted position that no Will is valid if the same is procured by practising fraud, undue influence and coercion. There is no evidence on record so far that there had been any case of undue influence, fraud and coercion upon the testatrix in execution of the Will. From the facts and circumstances on record, it appears that three caveators who jointly filed caveat to grant of the probate to the Will of the testatrix had voluntarily withdrawn their caveat. It becomes apparent that there was no valid ground to file caveat to the grant of probate to the Will of the testatrix. Same is the conduct of the single caveator who himself during his lifetime and after his death, his heirs and legal representatives did not choose to contest the probate proceeding or grant of letters of administration.

(14) According to the learned counsel there is no impediment to allow the present petitioners' prayer.

(15) The learned Counsel has referred to the following decisions in support of his contention:-

- a. AIR 1995 SC page 1684
- b. AIR 2020 SC page 2614

- c. AIR 1993 Patna 129
- d. AIR 2022 SC 1585

(16) After going through the pleadings, materials on record including the depositions of the witnesses, it appears that though initially caveats were lodged from some relatives of the deceased challenging the prayer for granting probate in respect of the last Will of the deceased Makhanrani Dutta, ultimately the said caveats were discharged and none appeared to contest the instant suit. It appears that original joint executors who were the initial beneficiaries have died and out of them one was bachelor and the other executor died leaving behind his legal heirs and representatives who were duly substituted in the suit.

(17) In order to prove the genuineness of the Will Mr. Basukinath Dutta son of Late Baidyanath Dutta who was one of the joint executors and Mr. Siddharta Mukhopadhyay, learned advocate and a renowned person of the locality, have been examined as PW1 and PW2 respectively.

(18) As the deceased Makhanrani Dutta was issueless, she allegedly executed the Will in favour of her sister's sons namely Baidyanath Dutta and Chandranath Dutta, since deceased. It is further found from the evidence and other materials on record that the Will was executed in the year 1957 and now it is 2023 and therefore it will be difficult to assume that the attesting witnesses to the said Will are alive. However, in order to prove the genuineness of the Will, the son of one of the attesting witnesses, since

deceased, has been produced before this court and Mr. Sidhartha Mukhopadhyaya, the learned Advocate and resident of the locality of the testatrix, has entered into the witness-box to prove the signature of his father namely, Ananda Mukherjee who was one of the attesting witnesses of the impugned Will. If we peruse the evidence of PW2 we shall find that he has identified his father's signature in open court. He has further stated that his father died on 07.12.2009 and for which one death certificate was produced before this court.

(19) However, considering the depositions of PW2 there is nothing on record to disbelieve his depositions. Therefore in my considered opinion as the said Will was executed long back i.e. in the year 1957 it is very difficult to believe that the attesting witnesses are alive till today. Section 68 of the Indian Evidence Act, 1872 has also laid down that at least one attesting witness must be produced to prove the genuineness of a Will but in case of death of attesting witnesses, reliable evidences are required to be produced to prove the signatures of attesting witnesses. Section 69 of the Indian Evidence Act, 1872 has laid down the provision relating to proof where no attesting witness is found. Section 69 is hereunder:-

69. Proof where no attesting witness found.—*If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.*”

(20) In this suit it appears that all the attesting witnesses have died as per deposition of PW1. However, the son of one of the attesting witnesses has been produced and he has been able to prove his father's signature on the impugned Will. Therefore, the requirement of law has been fulfilled since there is nothing adverse to the evidence of PW2.

(21) I have also considered the deposition of PW1 Sri Basukinath Dutta who has deposed before this Court that at the time of execution of the Will he was in the room where such execution was taken place. He also deposed he saw that Makhanrani Dutta put her LTI by pen of Narayanchandra Dawn who was a close relative of PW1. He has further deposed that he saw Narayanchandra Dawn to put his signature on the Will and he also knows the signature of other attesting witness Kalidas Pal who was his paternal uncle. However at the time of deposition the PW1 was aged about 75 years. Therefore, he was about 9/10 years old on January 21, 1957 when the Will was executed. Though it is difficult to rely upon the deposition of PW1, who was a boy of 10 years at the relevant point of time, but there was nothing on record to challenge such deposition of PW1. There is no witness from any side to contradict such deposition of PW1.

(22) Considering all the aspects I do find that the petitioners have been able to prove their case and there is nothing on record to disbelieve the genuineness of the impugned Will. Hence it is ordered that the letters of administration in respect of the estate and the properties of Late Makhanrani Dutta as mentioned in the Will be issued in favour of the

plaintiffs of testamentary suit no. 13 of 2005 (PLA No. 22A of 1971) (arising out of Probate Case No. 14 of 1960 of the Learned Court of District Delegate 24 Parganas at Alipore). Cost of proceeding incurred by the plaintiffs shall come out of the estate of the deceased. The testamentary suit no. 13 of 2005 is accordingly disposed of.

(23) Decree may be drawn up expeditiously as the matter is of the year 1960 and further the letters of administration be granted to the plaintiffs subject to payment of necessary stamp duty and court fees as applicable, and also upon furnishing a personal bond for a sum of Rs. 5,00,000/- (Five Lakhs) with one surety.

(24) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

(APURBA SINHA RAY, J.)