

06.08.2024.  
Item No. 13.  
Court No. 13  
ap

**F.A. No. 431 of 2009**

**Smt. Maya Bhattacharjee & Ors.  
Versus  
Sambhunath Chakraborty & Ors.**

Mr. Arup Banerjee.

...For the appellants.

Mr. Uttiya Ray,  
Mr. Arnab Mandal.

...For the respondents.

1. The instant appeal is directed against the judgment dated 19<sup>th</sup> May, 2006 passed by the learned Judge, Special Court-cum-Additional District Judge, Burdwan in Will (Probate) Case No. 4 of 2004 that was previously renumbered as 1 of 2002 from the Original Application No. 115 of 2001.

2. By the said judgment, the suit was decreed and letters of administration were granted to the respondents.

3. The respondents filed an application for grant of probate, of a holographic Will dated 8<sup>th</sup> April, 1989 executed by their father, late Jitendranath Chakraborty. in the Court below under the provisions of Section 276 of the Indian Succession Act, 1925. The applicants are two brothers and beneficiaries, namely, Sambhunath Chakraborty and Rajendra Prasad Chakraborty.

4. The objectors were their five sisters, namely, Kalyani Chakraborty, Maya Bhattacharjee, Anjali Roy, Sibani Banerjee and Chhaya Bhattacharjee.

5. There were three named witnesses, who attested the Will. The testator was 93 years of old when he made the alleged bequest. He died about nine months after executing the Will on 17<sup>th</sup> March, 1990.

6. In the Will the Testator bequeathed his immovable property at Burdwan comprising of a one-storied house exclusively to the two applicants. The testator had taken due care of his five daughters by bringing them up and giving them in marriage bearing all expenditures. The daughters were well-settled in life. They were thus not granted any portion of the estate.

7. The named executor in the Will was the mother of the propounder and wife of the testator, Smt. Surabala Chakraborty. She died within six months of the death of the testator.

8. Upon receipt of objection after the Will was cited, the application became a contentious cause and was converted into a suit. The contentions of the objectors were as follows:

- (a) Their father did not have the mental and physical capacity to execute the Will.
- (b) The handwriting of the Will was not that of their father.
- (c) The father was on medical treatment for five years before the date of the Will.

(d) The father loved his daughters and sons equally and would not have deprived the daughters of their share in his estate.

(e) Lastly, it was contended that if not the other four daughters, the father, who was particularly close to Anjali Roy, would have at least bequeathed a portion of the property to her.

9. Sometime on 16<sup>th</sup> December 2004, the respondent no.1 Sambhunath Chakraborty had filed a written complaint before the District Judge, Burdwan that one day, his younger brother approached him with a paper, stated to be their father's Will. The signature of their father on the bottom portion of the Will was scored out, both in English and Bengali. There were allegedly no witnesses in the document at the relevant point of time. Sambhunath complained that he was not aware that he was signing an application under Section 276 of the Indian Succession Act, 1925 to seek Probate of the Will in question. He had hurriedly signed the application on his way to work, without enquiring about its contents.

10. Sambhunath further stated in the said complaint that he was taken by his brother to a Lawyer, namely one Kanchan Banerjee in Burdwan. The said lawyer advised the brothers that the Will with the signature of the testator scored out, would not be enforceable in law. The Advocate is stated to have marked, in pencil, a portion containing the scored out

signatures of the testator at the bottom of the Will to be burnt out or destroyed and only then he would be able to apply for Probate of the Will.

11. He also advised that the signatures of the witnesses must be put on the Will since the document that was shown to the said Advocate but not witnessed.

12. Upon Sambhunath being reluctant, Rajendra Prasad, the younger brother, took the initiative and used a burnt incense stick to carefully burn out the scored out English and Bengali signatures of the testator. The signatures of the witnesses are stated to have been obtained subsequently.

13. In the said complaint, Sambhunath requested the District Judge, Burdwan to start an enquiry invoking Section 195 read with Section 340 of the Code of Criminal Procedure.

14. The District Judge referred the complaint to the Trial Court. The said complaint was discarded by the Trial Judge as being vague, by order dated 27<sup>th</sup> June 2005

15. Sambhunath thereafter made an application for transposing him as a defendant in the said suit. The said application was resisted by the plaintiff no.2 Rajendra Prasad.

16. The Court below, by an interlocutory order dated 26<sup>th</sup> July, 2005, dismissed the application for transposition, inter alia, by reference to the order

discarding the complaint to the District Judge, Burdwan. The Court found that there was no mis-joinder of parties and adjudication of the proceedings would not be affected if transposition is not done. The Court however did not address the principal contention of Sambhunath Chakraborty that there was no common interest between him and Rajendra Prasad. An affidavit filed by Sambhunath Chakraborty in furtherance of his application was kept with the record but not considered. In the said application, the principal objector, namely, Anjali Roy, had also filed an affidavit in support of the application, which was not considered.

17. This Court finds a grave and serious error committed by the Trial Court in the order dated 26<sup>th</sup> July, 2005. Sambhunath, the Co-propounder/co-plaintiff, had stated on affidavit, that the purported Will produced in Court is tampered and or manufactured. He had also stated that the testator did not intend to give effect to the said document and has scored out his signature on the said will. Sambhunath also stated the signatures of the witnesses were obtained subsequently by Rajendra Prasad Chakraborty on the advice of the said Advocate.

18. There was clear and apparent conflict between the two plaintiffs as regards the will. They had clearly come to loggerheads with each other. They could therefore not remain on the same side. Sambhunath

Chakraborty also claimed that he had signed the application for Probate in a rush, without applying his mind thereto.

19. In such a situation, Sambhunath Chakraborty and Rajendra Prasad Chakraborty could not have continued as co-plaintiffs as there is no commonality of interest between them. In fact, the stand of Sambhunath is diametrically opposite to that of Rajendra Prasad. He ought to have been transposed as a defendant in the suit.

20. The learned Trial Court therefore committed error in passing the order dated 26<sup>th</sup> July, 2005. The same is ex facie illegal and contrary to the provisions of Order I, Rule 10 of the Code of Civil Procedure, 1908. None of the parties however challenged the said order

21. The matter became peculiar and paradoxical thereafter. The Court below proceeded with the hearing of the suit and framed the following issues:

- (1) *Is the case maintainable in its present form?*
- (2) *Is there any cause of action to file this case?*
- (3) *Is the disputed Will forged and manufactured after the death of the testator?*
- (4) *Was the testator in sound disposing mind when the Will was executed?*
- (5) *Are the petitioners entitled to get the relief as prayed for?*
- (6) *To what other relief or reliefs the petitioners are entitled?*

22. On behalf of the plaintiffs, Rajendra Prasad Chakraborty examined himself as PW-1. Satya Ranjan Sarkhel and Rabindra Sadhan Bishnu, respectively, were PW-2 and PW-3. They were named attesting witnesses to the will. Their evidence is clear and explicit. Neither the Trial Court nor this Court can find fault with such evidence. The evidence is consistent and has not been upset in cross-examination.

23. What is, however, fatal to the case is that Sambhunath Chakraborty, who wanted to oppose the case of Rajendra Prasad Chakraborty, did not get an opportunity to cross-examine PW-1, PW-2 or PW-3.

24. Curiously he was summoned as a witness by Anjali Roy, the principal defendant, who was spearheading the defence against Rajendra Prasad.

25. Sambhunath deposed as OPW-2 and Anjali Roy deposed as OPW-1. In his entire examination-in-chief and cross-examination, Sambhunath has reiterated that an alleged Will was stated to have been found by Rajendra Prasad in 2001, in an old tin box out of the belongings of the testator in the house. The Will was written on plain paper (understood as not being a stamp paper).

26. The signature of the testator was scored out in English and Bengali at the bottom of the Will. The signature of the testator on the top of the Will in Bengali remained intact. The paper allegedly had no witnesses. Rajendra Prasad on the advice of the

Advocate concerned carefully burnt out the paper where the scored-out signatures of the testator were available. He is stated to have subsequently obtained the signatures of the witnesses to the Will.

27. Anjali Roy deposed exactly what she stated in her written objection as already enumerated hereinabove. Her evidence may have been partially dislodged in cross-examination. The evidence of Sambhunath Chakraborty, however, does not appear to have been dislodged.

28. Sambhunath corroborated the statements in the application for transposition dated 27<sup>th</sup> June, 2005 and the complaint to the District Judge filed on 16<sup>th</sup> December, 2004 already referred to hereinabove. The said complaint is admittedly part of the records of the suit and has been scrutinized by this Court. The suit should have been dismissed after the deposition of the Sambhunath who was plaintiff No.1.

29. The Court below went on to hear oral arguments of the Advocates for the parties and proceeded to deliver judgement.

30. The Court found favour with the applicants in respect of the issue nos. 1 and 2. The issue nos. 3, 4 and 5 were dealt with by the trial Court by finding that there were no suspicious circumstances surrounding the execution of the Will. In fact, this Court also finds that the evidence of the attesting witnesses is clear

and uncontroverted and could not be shaken in cross-examination.

31. However, the said evidence of any of the plaintiffs' witnesses could not have been accepted by the Court below since Sambhunath Chakraborty did not get an opportunity to cross-examine them.

32. No credence ought to have been given to any of the evidence of PW-1, PW-2 and PW-3 by the Court below. There is gross miscarriage of justice and a mistrial in the instant case.

33. Notwithstanding the above, the Court went on to examine the effect of the burning out of the document that was exhibited as the testator's Will based on the evidence of PW-1 and PW-2.

34. The following discussion is made, assuming that the evidence of PW-1, PW-2 and PW-3 was sustainable. The Court below went on to find that there were no suspicious circumstances in execution of the Will dated 08.04.1989.

35. As regards the effect of the burnt-out portion of the Will, the Court below relied upon Section 70 of the Indian Succession Act 1925 to determine as to when and how a Will can be deemed as revoked by the testator.

36. The Court below referred to and applied an English decision of the Court of Appeals in **Cheese Vs Lovejoy** reported in [LR] 2 PD 251, where the testator, after executing a Will penned through various

lines and wrote, "This is revoked" and threw it away. A servant picked up the thrown Will and puts it in the kitchen, where it remained till the testator's death.

37. It was found 8 years later and probate was granted. The said Will was enforced and probate was allowed by the Court of Appeals. It was held that the Will was not revoked as the actions of the testator did not qualify as otherwise destroying under the English statutes.

38. Learned counsel for the respondent has placed a decision of a single bench of the Bombay High Court in the case of ***Kharshetji Ratanji Bomanji Vs. Kekobad S. Khambatta*** reported in ***AIR 1928 Bombay 194***, particularly, paragraph 10 thereof.

39. The facts of the ***Kekobad S. Khambatta case (supra)*** are rather interesting. In the said case, there was a 12 page Will along with a codicil prepared by a solicitor at the instance of the testatrix. The Will was torn in part by the testatrix on the advise of the Solicitor. It was further written in the Gujarati language that the "Will is cancelled" on the first page. The first two pages of the Will also were found crossed by pen. The signature of the testator and the codicil of the other portions of the Will remained undisturbed. Two pages in between were found blank.

40. In those circumstances, the Court discussed the scope of Section 70 of the Indian Succession Act

and went on to hold that the Will has not been revoked in the manner indicated under the Act.

41. Reference was, however, made in the ***Khambatta case (Supra)*** to a decision of a three-Judges bench of the Calcutta High Court headed by the then Chief Justice, in the case of ***Jaharlal De Vs. Dhirendralal De*** reported in ***(1915) 20 Calcutta High Court Notes 204.***

42. In the ***Jaharlal De case (supra)***, the facts were that the Will in question was marked by the testator on the instructions of his attorney as cancelled. Her signatures were struck out and the Will was torn in the middle for about 3 or 4 inches. Tearing of the Will according to three-judges bench of the Calcutta High Court in ***Jaharlal case (supra)*** amounted to a revocation within the meaning of Section 70 of the Indian Succession Act.

43. The facts of ***Jaharlal De case (supra)*** appear to be more applicable to the facts of the instant case than the facts of ***Khambatta (supra)*** cited by the learned counsel for the respondents.

44. Counsel for the respondents Mr. Uttiya Ray lastly relied upon a decision of ***C.G. David Tharakan, Plaintiff Vs. Dr. Mrs. Lily Jacob, Defendant*** reported in ***AIR 1993 Kerala 9.***

45. The upshot of the aforesaid decisions and Section 70 of the Indian Succession Act, is, whether by the scoring out his signature, burning or otherwise

destruction of the will, the testator in fact did not want his Will to be given effect to. This is, in essence, the test to be applied under Section 70 of the Indian Succession Act. The answer would depend on the facts and circumstances of each case.

46. In the instant case, the respondents may have lost the chance to prove the real intention of the testator and may have also attracted criminal proceedings against them for having burnt out with an incense stick, the scored out signature of the testator on the Will in question.

47. There is sufficient evidence on record to indicate the criminal act of destruction of evidence and obstruction of the course of justice by Rajendra Prasad Chakraborty.

48. This is based on the oral evidence of Sambhunath Chakraborty in the trial, the complaint dated 19<sup>th</sup> November, 2005 to the District Judge and application for transposition. It is quite possible that the testator may have in fact executed the Will with or without the presence of the witnesses. The Court below could have referred the Will for forensic examination to determine the date on which the witnesses had put their signatures by chemical analysis of the ink, which has not been done.

49. Having regard to the decisions referred to above and Section 70 of the Indian Succession Act 1925, the following undisputed evidence clearly indicates that

the testator intended not to give effect to the Will dated 08.04.1989:

(a) The testator did not tell any of his children about the execution of the Will, despite clear evidence of PW 1 that the testator always disclosed all his actions to his children.

(b) There is no evidence to suggest whether the testator disclosed execution of the Will even to his wife. Even if disclosed, the named executor, during her life time, did not come forward to either disclose his Will or seek probate thereof.

(c) The complaint dated 16<sup>th</sup> December, 2004 by Sambhunath Chakraborty to the District Judge, Burdwan, the application for transposition and the oral evidence of Sambhunath Chakraborty as OPW-2. The acts of Rajendra Prasad Chakraborty burning out a portion of the Will, with an incense stick particularly the scored out signatures of the testators, as marked by the said Advocate Mr. Ranjan Banerjee (since deceased).

(d) The purported Will dated 8<sup>th</sup> April, 1989 was kept in an old tin box which was discovered sometime in the year 2001 by the respondents.

50. Applying the test in the ***Jaharlal case (supra)***, this Court is of the clear view that Jitendranath did not intend to give effect to the contents of the Will dated 08.04.1989. By scoring out his signature albeit

at the bottom of the Will, Jitendranath, in the facts of the case, must be deemed to have revoked his Will. The Evidence of PW1, PW2 and PW3 are really of no consequence, on this issue.

51. There is also some evidence on record indicating the discord between Jitendranath and his wife on one side and the aggressive Rajendra Prasad and his wife on the other side. Anjali Roy in her oral evidence has indicated as such. The evidence could not be dislodged.

52. It has also come on evidence that Sambhunath has been living separately at Durgapur due to family discord. It is quite possibly inferable that the testator changed his mind about bequeathing his house to his two sons after discord with them.

53. For the reasons stated hereinabove, the impugned judgment and decree dated 19<sup>th</sup> May, 2006 cannot be sustained and is hereby set aside.

54. The Court grants sanction to prosecute Rajendra Prasad Chakraborty and any other person that may be involved in any offences inter alia under Section 229, 230 and 231, under the Bharatiya Nyaya Sanhita, 2023. The District Judge, Purba Bardhaman shall refer the prosecution to the Chief Judicial Magistrate, Purba Bardhaman to commence appropriate proceedings immediately upon receipt of a copy of this order.

55. The appeal is allowed with costs assessed at Rs. 7,000/- payable to each of the objecting respondents and/or their legal heirs by Rajendra Prasad Chakraborty. The payment of costs shall be in addition to sanction of prosecution as ordered hereinabove.

56. Let the LCR be returned back to the Court below.

57. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all formalities.

58. 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.)**

**(Ajay Kumar Gupta, J.)**