

05.10.2024
Court No.13
Item No.60
AP

FA 352 of 2014

Arindam Chattopadhyay
(Smt. Purabi Chattopadhyay since deceased)
Vs.
Smt. Anita Lahiri & Ors.

Mr. Gopal Chandra Ghosh
Mr. Prosenjit Mukherjee

...For the Appellant.

1. The respondents were not represented yesterday and are not represented today.
2. The matter was heard on length yesterday and today.
3. The appeal arises out of a judgment and order dated 28th March, 2012 passed by the Additional District and Sessions Judge, Fast Track Court, Bishnupur, Bankura in Probate Suit No.01 of 2005. By the judgment the Court was pleased to dismiss the application for probate.
4. The brief facts relevant to the case are that one Abanindra Nath Chattopadhyay executed a Will and testament on 6th January, 2002. In the Will he settled his movable and immovable assets in favour of his two sons Arindam Chattopadhyay and Gopal Chattopadhyay. The wife of the testator namely Purabi Chattopadhyay was made the executrix.
5. It is further mentioned in the Will that the younger son Gopal Chattopadhyay was physically challenged. In

the event he got married, he and his legal heirs would be entitled to 50% of the share bequeathed to him. In the event, however, he did not get married and died, his share would vest upon the elder son Arindam Chattopadhyay. The wife/executrix was given a life interest in all the moveable and immoveable properties of the testator and also residual portion of the cash in the accounts of the testator after defraying all expenses towards the testator's funeral.

6. The testator had four daughters to whom he did not bequeath anything.

7. After the death of the testator, the executrix applied for probate of the Will. Citations were issued to the natural legal heirs of the testator. The daughters of the testator namely Anita Lahiri, Nivedita Goswami, Nandita Chatterjee and Madhumita Banerjee contested the application for probate and the proceedings were converted into a contested suit.

8. The four daughters filed a single written statement inter alia contending that the Will was forged and factious. The attesting witnesses were strangers to the family. The testator had no mental capacity to execute the Will. The testator loved his daughters as much as he loved his sons. The testator would not have excluded his daughters from his estates and the same constitutes the suspicious circumstances. The Will was procured

fraudulently. The testator did not disclose the Will to the daughters.

9. It was further averred that the testator had not mentioned details of the property in his Will and hence the said Will, even if proved to be correct, cannot be given effect to.

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

“-: I S S U E S :-

1. Is the suit maintainable in its present form?
2. Has the petitioner any cause of action or right to file this suit?
3. Is the alleged Will legal, valid and acceptable in law as alleged?
4. Is the value of property in question is correct?
5. Whether petitioner has filed required valuation amount?
6. Is the petitioner entitled to get the relief as prayed for?
7. Is the plaintiff entitled for another relief?”

11. The executrix was the PW 1. Indranath Bhattacharjee was an attesting witness was PW 2. Nandita Chatterjee, one of the daughters, was the DW 1. Both witnesses were cross-examined.

12. Based on the evidence on record and the arguments of the parties, the Court went on to pronounce the impugned judgment. The Court found that the suit was maintainable. There was no suspicious

circumstances in the attesting witnesses not being known to the family. The testator was found to be of sound mind. In essence the Court found the Will to be duly executed and otherwise proved.

13. Despite the above, the Court went on to accept the arguments of the advocate for the defendants that since the Will did not contained any schedules or appendices no probate could be granted for the same.

14. Reliance was placed by the Court below on a judgment of the Supreme Court cited by the defendants/respondents in the case of **Anil Kak Vs. Kumari Sharada Raje and Ors.** reported in **(2008) 7 SCC 695** equivalent to **AIR 2008 SC 2195**.

15. Placing reliance on the said judgment, the Trial Court was of the view that a Will, which does not contained particulars/schedules of the properties bequeathed, is incomplete and no probate can be granted for the same.

16. This Court has very carefully considered the aforesaid decision of **Anil Kak (supra)**. This Court firstly finds that the said decision does not lay down any proposition of law to the effect that a Will without details of the property bequeathed thereunder and/or without schedules specifying each of the said properties cannot be probated. Learned Judge, thereafter committed an

error in holding that the **Anil Kak (supra)** decision laid down any such proposition.

17. The facts of the **Anil Kak (supra)** decision must be taken note of in the context. In the said decision, the Supreme Court was testing the validity of a Will with 3 Appendices probate whereof was sought. The Court found that while the testatrix stated in the Will that her four daughters would get equal share in her properties, the Appendices indicated an unequal distribution.

- (a) The Appendices were not in existence when the Will was executed although the Will referred to Appendices A, B and C.
- (b) The Appendices were not signed by the witnesses.
- (c) One of the executors beneficiaries, had taken the Will away with him and kept it without disclosing it to the others.
- (d) The valuation report of the properties in the Appendices clearly indicated an unequal distribution between the beneficiaries.

18. It is in the above facts that the Supreme Court held at Paragraphs 32 and 36 as follows:-

“32. Principle of incorporation by reference was evolved so as to avoid unnecessary repetition of the same documents again and again in different parts of the original document. For invoking the said principle, a document must be in existence. It cannot be brought into existence later on. The executor of a document must know what the other document which he intends to incorporate in the will contains.

36. If the appendices formed an integral part of the will and in their absence the will was not complete, then the intention of the testator cannot be effectuated. A distinction must be made between an incomplete will

and a complete will although intention of the testator cannot be effectuated.”

19. It was found in the facts of the said case, that the appendices in the Will formed integral part of the Will and in their absence the Will would not be complete and hence no probate could be granted. It was further found that the witnesses had not signed on the appendices. The intention of the testator could not therefore be clearly ascertained.

20. This Court, therefore, clearly of the view that the **Anil Kak (supra)** decision is wholly inapplicable to the facts of the case.

21. In the instant case, this Court finds that the testator did not given particulars of his moveable and immoveable properties except to state that all his moveable and immoveable properties would go to his two sons after his death. The details of the properties have been mentioned by the executrix in the application for probate in the Schedule. There was no dispute to the same.

22. For the reasons stated hereinabove, this Court is of the view that the Will has been proved in terms Section 63 of the Indian Succession Act.

23. The impugned judgment dated 28th March, 2012 shall therefore stand set aside. There shall be a probate of the last Will and testament of Abanindra Nath Chattopadhyay dated 6th January, 2002.

24. Let a certificate of probate be issued in favour of the executrix in respect of the said Will and further proceedings under the Act of 1925 be completed within a period of four months from the date of receipt of a copy of this order.

25. With the aforesaid directions, the appeal is allowed and disposed of.

26. There shall be no order as to costs.

27. Let the T.C.R. along with original Will be returned to the court below.

28. The Registry shall communicate this order to the Court below.

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

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)