

**IN THE HIGH COURT AT CALCUTTA,
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Sabyasachi Bhattacharyya

And

The Hon'ble Justice Uday Kumar

F.A.T 135 of 2018

Raj Kumar Ghosh and Others

-Vs-

Sinchita Ghosh

For the Appellants : Mr. Tanmoy Mukherjee
: Mr. Manik Lal Poddar
: Mr. Souvik Das
: Mr. K.Raihan Ahmed
: Mr. Tapas Chatterjee

For the Respondent : Mr. Dhiraj Trivedi
Mr. Sunil Gupta

Heard concluded on : 12.11.2024

Judgment on : 19.12.2024

Uday Kumar, J.:-

1. Appellants challenged the order (deemed decree) dated 20.11.2017 of Learned Additional District Judge, 1st Court Sealdah, passed in connection with O.S 26 of 2013, whereby letter of administration of

testamentary property under the last Will and testament of Arati Ghosh executed on 22nd February 2007, was granted to the respondent/plaintiff.

2. Testatrix Aarti Ghosh executed her last Will on 22.02.2007 in respect of the premises at 34/ 1 J.K. Mitra Road Kolkata. She appointed Jayanta Ghosh as propounder of the testamentary property. She passed away on 20th April 2007 leaving behind her husband Tarapada Ghosh, two sons Jayanta Ghosh, Rajkumar Ghosh, two daughters Alpana Roy, Chanda Ghosh, one daughter-in-law Mandira Ghosh w/o Jayanta Ghosh, and a grand-daughter, Sinchita Ghosh daughter of Jayanta Ghosh, as her legal heirs and successors. Her husband Tarapada Ghosh was suffering from paralysis. He died on 31.05.2013.
3. Jayanta Ghosh, met an unfortunate death on 1st May 2013, leaving the Will unprobated. Wife Mandira Ghosh and daughter Sanchita Ghosh were legal heir and successor of his estate. For better administration of the property under the Will, Sinchita Ghosh filed an application under Section 278 of Indian Succession Act, 1925 (hereinafter referred to as Act), to the Probate Court for grant of letter of administration in respect of the said testamentary property on 1st April 2014.
4. Out of bitter family feuds, defendants /appellants Raj Kumar Ghosh, Alpana Roy and Chanda Ghosh, son and daughters of testatrix, contested this proceeding, on the ground of -
 - i. Testatrix Arti Ghosh had no testamentary capacity as she was not in her sound mind, memory and understanding at the time

of execution of the alleged Will, as she was bedridden, due to her illness and old age.

- ii. Rupa Ghosh, wife of Raj Kumar Ghosh, was not impleaded in the Probate Suit as defendant, and
- iii. Jayanta Ghosh, father of applicant, procured the said Will by undue influence and
- iv. Signature of Arati Ghosh on the Will was forged as they claimed on the basis of their personal acquaintance of her signature and they prayed for:

- (a) Dismissal of the application for granting letters of administration in respect of the property mentioned in the schedule of the Will,
- (b) Cancellation of the order for grant of letter of administration and
- (c) Declaration of the Will of Arati Ghosh as null and void.

5. Mr. Tanmoy Mukherjee Learned Counsel for the appellant challenged impugned order on the ground that-

- a. The impugned order of Learned Additional District Judge, 1st Court at Sealdah dated 20.11.2017 is bad in law, because letters of administration was granted without verifying its veracity and despite the material defect of non-joinder of necessary party, Rupa Ghosh, wife of Rajkumar Ghosh, as defendant in the probate suit.

- b. Arati Ghosh was not mentally sound and alert to take her rational decision due to her illness, old age and effect of morphine. The prescription of doctor as submitted by defendants/appellants, was not considered by Learned Trial Court.
 - c. Appellants did not sign the Will voluntarily but she executed it under influence of propounder Jayanta Ghosh.
 - d. Evidence of Alpana Ray DW2 was not considered by Learned Trial Court.
 - e. The presence of so many riders makes the Will doubtful as it may indicate presence of suspicious circumstances.
- 6.** Per contra, Mr. Dhiraj Trivedi, Learned Counsel for the respondent submitted that:
- i. Attestation of Will and execution of Will has been properly proved, as appellants admitted their signature on the Will.
 - ii. None has challenged the signature of testatrix on the Will, as well.
 - iii. Element of undue influence, under which either testatrix or appellants or Rupa Ghosh put their signature on the Will, have not been proved by appellants rather Learned Trial Court granted Letter of Administration on 20.11.2014 after satisfaction to the count of undue influence and mental and physical condition of the testatrix.
 - iv. Mere allegation is not sufficient without proper proof.

- v. Riders are relevant for the disposition of testamentary property in natural manner.
- 7.** Indubitably, onus is on the propounder to prove a valid Will, following the statutory provisions. Sections 59 and 63 of the Indian Succession Act, 1925 states about the necessary requirement for a valid Will, while Section 67 and 68 of the Indian Evidence Act, 1872 provides the manner to prove a Will.
 - 8.** The burden is always on the propounder of the Will to prove that
 - i. this is the last Will of testatrix,
 - ii. she had executed it wilfully and voluntarily and
 - iii. she signed the Will after knowing and understanding the content, nature and effect of Will,
 - iv. one additional burden on the propounder is to dispel the suspicious circumstance surrounding the Will, if any.
 - 9.** The standard of proof for a Will is different to that of the proof of other document, to the extent that it requires to fulfil the special requirement of attestation. The test to be applied in such matter would be the satisfaction of the mind of a prudent person.
 - 10.** The propounder is bound to prove that:
 - i. The Will was signed by the testator,
 - ii. The testator at the relevant time was in a sound and disposing state of mind,

iii. He understood the nature and effect of the dispositions and put his signature to the document of his own free Will by satisfactory evidence.

11. Generally, Court derives its finding in favour of propounder of the Will, when the evidences adduced in support of the Will are impartial, reliable, reasonable and adequate to prove the sound and disposing state of the testator's mind at the time of execution of Will and genuinity of his signature.
12. Appellants challenged the testamentary capacity of Arati Ghosh on the ground that she had no disposing state of mind at the time of execution of Will due to her illness, old age and injection of morphine.
13. In this respect, Section 59 of the Indian Succession Act, 1925, clearly mandates that every person of sound mind and not being minor are competent for execution of a Will. Even an ordinarily insane person can make a will during intervals when they are of sound mind, but the intoxicated and ill people cannot execute a Will, if he is unable to understand the consequences.
14. Section 59 of the Indian Succession Act, 1925 is related to the Person capable of making Wills. It provides that *“Every person of sound mind not being a minor may dispose of his property by Will.*

Explanation 1. —A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2. —Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3. —A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4. —No person can make a Will while he, is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations –

- (i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.*
- (ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.*
- (iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property makes a Will. This is a valid Will.”*

15. None of the witnesses doubted the sanity of the testatrix. Rather PW1 and PW2 stated in their oral testimonies that at the time of execution of the Will, Aarti Ghosh was of sound mind, memory and understanding,

and she executed the Will while she was hale and hearty. However, both PWs were not specifically cross-examined on the mental and physical capability of testatrix. Admittedly, Arati Ghosh underwent chemotherapy and was advised to take injection of morphine for getting relief from carcinogenic pain, as she was suffering from cancer from 2005.

16. On the contrary DW1 and DW2 deposed that at the time of execution of Will, their mother Aarti Ghosh was of unsound mind, without any memory and understanding, as she was advised to take injection of morphine for management of carcinogenic pain. A photostat copy of medical prescription of Arati Ghosh, a 72-year-old female, dated 31.01.2007, was submitted by DW1 on 17.12.2016, which was marked as 'X for identification'. He stated in his cross-examination that he could produce document to show that his mother was of unsound mind at the time of execution of Will, but no such document was ever filed.
17. To strengthen his contention that sedative effect of morphine affects soundness of mind of a person, Learned Counsel for the appellant heavily relied on the views expressed in '*Chapter 20 of Goodman & Gilman's THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 13TH EDITION by LAURENCE L. BRUNTON*', that "*Opioids are compounds structurally related to products found in opium including morphine, codeine, thebaine etc, are a mainstay of acute pain treatment, and opiate can produce drowsiness and cognitive impairment...*"

- 18.** He also relied on the view expressed in ‘*Chapter 34 of Opioid, Analgesic and Antagonists of Essential of MEDICAL PHARMACOLOGY 6TH EDITION*’ that “*morphine causes sedation which is different from that produced by hypnotics is seen. Drowsiness and indifference to surroundings as well as to own body occurs without motor incoordination, ataxia or apparent excitement (contrast alcohol). Higher doses progressively induce deep sleep and coma. Morphine has no anticonvulsant action, rather, fits may be precipitated.*”
- 19.** Admittedly, testatrix Arati Ghosh, a female of 72 years, was suffering from “carcinoma of pancreas with severe pain” since 2005, and Dr. Gautam Mukhopadhyay had advised her to take injection of morphine (2 cc), to subside her carcinogenic pain. A photostat copy of the medical prescription issued by Dr. Gautam Mukhopadhyay on 31.01.2007, as submitted by DW1 on 17.12.2016, was marked ‘X for identification’. The said medical prescription has no probative value as its content was not proved by its maker i.e., Dr. Gautam Mukhopadhyay, and its original was not produced. Content of unexhibited document cannot be considered. That is why this document was not considered by Learned Trial Court. In absence of corroborative evidence, we cannot assume existence of unsoundness of mind of Arati Ghosh at the time of execution of Will, merely on the submission of Learned Advocate for the party. The onus was on the appellant, but he failed to discharge the same.

- 20.** Secondly, it appears from the document that the injection of morphine was advised only for 15 days, i.e. till 14.02.2007, while Will was executed on 22.02.2007, one week after the purported last dose of injection of morphine. Nothing is on record to show that the said treatment was either repeated or extended for further period. In this conspectus of the facts, we can deduce that mind of testatrix was free from the effect of morphine by that time, if any.
- 21.** Thirdly, the journal opined that *“morphine (opiate) can produce drowsiness and cognitive impairment only. Higher doses progressively induce deep sleep and coma. Morphine has no anticonvulsant action, rather, fits may be precipitated. such drowsiness and indifference to surroundings as well as to own body occurs without motor incoordination, ataxia or apparent excitement (contrast alcohol).”* In any event it does not show that mental soundness of a person may be affected by clinical dose of morphine, it administered to a cancer patient for management of her carcinogenic pain under medical supervision.
- 22.** We are also not convinced to the contention of Learned Counsel for the appellant that pancreatic cancer affect soundness of her mind or had caused her mental infirmity. It has no relations with mental health. Only mental illness affects mental soundness of a person. Other disease may cause mental agony but it is not synonymous with mental unsoundness. Clinical application of morphine to patients may cause drowsiness to them but cannot make a person unable to take rational

decision. Feeling of drowsiness and lacking of mental soundness are not same. Drowsiness can slow down physical activity of a person, not the mental alertness. No evidence is on record to show unsoundness of testatrix. As such we are not convinced to the contention of the appellants that the testatrix lacked her mental soundness due to influence of morphine injection at the time of execution of Will.

- 23.** Despite her illness she was hale and hearty at the time of execution of the Will and she used to go up and down herself, by using stairs, as appears from uncontroverted evidence of PW1 and PW2.
- 24.** As such, we do not find any hesitation to conclude that the testatrix had testamentary capacity to execute the Will, as she was an aged lady of sound mind.
- 25.** Requirements for execution of valid unprivileged Will are mandated under Section 63 of Indian Succession Act, 1925. It provides that the testator/testatrix should sign or affix his/her mark to the Will with the intention to give effect to the writing as a Will and it shall be attested by two or more witnesses, each of whom has seen the testator to sign in his presence or direction.
- 26.** Section 63 of Indian Succession Act, 1925 is related with the rules necessary for the execution of unprivileged Wills. It provides that *“Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules: —*

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
- (c) The Will shall be attested by two or more witnesses, each of whom has 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 his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”*

27. The manner to prove a document, where its execution is required to be attested under law, is guided by the provisions of Section 68 of Evidence Act, 1872. It deals with the proof of the execution of a document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. These provisions prescribe the requirements

and the nature of proof which must be satisfied by the party who relies on a document in a Court of law.

28. In that regard, PW1 stated in her examination-in-chief that

- a. The Will was prepared, read over and explained to testatrix Arati Ghosh by Advocate Manabendra Sinha, who put her signature on each page of the Will on 22nd February 2007 after understanding its content.
- b. PW1 was present there. She identified the Will and signatures of executor Arati Ghosh on the Will. The Will was marked Exhibit-1, and 5 signatures of the testatrix on different pages of the Will were collectively marked as Exhibit 1/1.
- c. Thereafter, PW1 put her signature on the Will as a witness to its execution. She identified her signature on the Will marked as Exhibit 1/2. Arati Ghosh executed her last Will in respect of scheduled property.
- d. She admitted in her cross-examination that her “debar” and “nanad”, i.e., appellants, were also present there at that time and they put their signatures on the Will voluntarily, because they agreed to do this in lieu of the expenses accrued against treatment of her mother-in-law being borne by Jayanta Ghosh. She denied the suggestion that her husband obtained signatures of her mother-in-law on the Will by taking advantage of her illness and mental incapacity.

29. Similarly, PW2 stated that

- a. Arati Ghosh executed her last Will and testament on 22nd February 2007 in respect of Premises No. 34/1, J.K. Mitra Road Kolkata.
- b. She was present at the time of execution of the Will and saw the execution of the Will by her grandmother.
- c. Her grandfather Tarapada Ghosh died on 30th May 2013.
- d. Rupa Ghosh wife of Raj Kumar Ghosh was also present at the time of execution of Will.
- e. Her presence was also affirmed by DW1 Rajkumar Ghosh. He admitted that both of them put their signature on the Will but Rupa's signature was taken by force. However, he admitted about the due execution of Will by Arati Ghosh on 22nd February 2007, upon which he put his signature. His signature on the Will was marked exhibit 1/3. His mother Aarti Ghosh was well conversant in Bengali language.

30. DW2 Alpana Roy also admitted the execution of Will by Arati Ghosh. She stated that she was present at the time of execution of the Will and she put her signature thereupon, as her elder brother forced her to do so. But she stated in her cross-examination that she put her signature on the Will at her home on the instruction of Jayanta Ghosh.

31. Learned Counsel for the appellant submitted that Jayanta Ghosh applied force, undue influence and coercion on testatrix, DW1, his wife Rupa Ghosh and DW2 for obtaining their signatures on the Will. But

they admitted in their cross-examination that no complaint was made by them to any competent authority in this regard nor registered any protest against them.

32. To verify whether the provision of Section 63 of the Act necessary for preparation of Will in question (Exhibit-1) has been satisfied or not and whether special requirement “to prove a document needs to be attested” as per Section 68 of Indian Evidence Act, has been complied for or not, we considered on the Will itself, from which it appears that:

- a. The subject Will is in Bengali language. It is typewritten. It was prepared by Learned Advocate Manabendra Sinha, as per instruction of Arati Ghosh, as it appears from the endorsement made thereupon in this regard.
- b. Testatrix has executed the Will on 22.02.2007, with intention to execute it, by putting her signature in Bengali, on its every page (4 pages).
- c. Attesting witnesses Alpana Roy and Chanda Ghosh, who are daughter of Arati Ghosh, have also signed on every page of the Will.
- d. Other attesting witnesses are, Kamal Krishna Roy, Dilip Kumar Ghosh, Jayanta Kumar Ghosh, Mandira Ghosh, Rajkumar Ghosh and Rupa Ghosh including Alpana Roy, Chanda Ghosh have put their signature on the last page of the Will. All of them are sons, daughters and daughters-in-law of testatrix Arati Ghosh.

e. There is an endorsement of Learned Advocate Manabendra Sinha put on the Will to the effect that it was prepared by him and he explained its content to Arati Ghosh. He identified the signature of testatrix.

- 33.** In any event, the gamut of evidence indicates that all legal formalities for preparation of Will have been duly complied with. It also indicates that the Will was properly executed and duly attested by witnesses. One attesting witness has proved the signature of testatrix and her signature on Will and she saw the testatrix signing on the Will. Therefore, petitioner ably discharged her burden to prove the last Will of Arati Ghosh.
- 34.** It is fact that appellant challenged the signature of testatrix on the Will but they did not take any steps for sending the same to the handwriting expert for testing of the genuinity of her signature. Opinion of expert and of persons acquainted with the handwriting of the person concerned, are relevant to prove their handwriting under Section 45 and 46 of the Evidence Act. Mere objection will not serve any purpose.
- 35.** Mere presence of rider in the Will, ipso facto, does not constitute a suspicious circumstance till they seem natural and in the line of succession. No third-party interest in the property beyond the family is created thereby.
- 36.** The contention that the probate case was brought after long gap of around seven years, itself, may create suspicion as to the genuinity of the Will but all sort of suspicions are not material in nature unless it

shake conscience of Court. Presence of legitimate suspicions against genuinity of a document are quite natural, as it has to be proved after death of its maker, but every suspicion would not cloud a Will.

- 37.** It is also contended that Rupa Ghosh was forced to put her signature on Will, but she was not examined in Court, despite being the best person to explain the circumstances.
- 38.** The propositions laid down in Paragraphs 18 to 24 of *H. Venkatchala Iyengar vs B.N. Thimmajamma and others* AIR 1959 SC 443, as relied by Learned Counsel for the appellants, have already been considered, as those propositions are necessary to prove a Will.
- 39.** Therefore, we conclude that:
 - a. The testatrix had testamentary capacity to execute a Will.
 - b. Medicinal use of morphine would not affect the mental capacity of a person to take rational decision. Causing drowsiness and mental incapability are not same.
 - c. The Will was properly executed and attested by witnesses.
 - d. Appellants were also present at the time of execution of Will and they put their signatures thereupon.
 - e. Appellants did not lodge any complaint to any authority for alleged application of undue influence or coercion on them by propounder of Will.
 - f. Rupa Ghosh also put her signature on the Will, but she was not examined as a witness before the Court to deny her signature or

to prove that she was compelled to put her signature on the Will.

g. There are no legitimate suspicions which could cast any cloud on the Will.

40. Thus, the learned Trial Judge has rightly decided that the petitioner has successfully discharged her onus to prove that the last Will of Arati Ghosh was duly executed in her presence, who attested the signature of the testatrix on the Will. He did not find any substance in the contention of appellants DW1 Rajkumar Ghosh and DW2 Alpana Roy that propounder has taken signature of testatrix on Will by undue influence and/or that she had no disposing mind at the time of execution of Will, due to her illness and old age.

41. In the light of above discussion, we conclude that this appeal being FAT 135 of 2018 deserves to be dismissed, due to lack of substance. The impugned judgment and order (deemed decree) dated 20.11.2017, granting letters of administration of the Will dated 22.02.2007 executed by late Arati Ghosh in connection with O.S 26 of 2013 suffers from no defects. Intervention of this Court is not required.

42. Consequently, the appeal fails. F.A.T 135 of 2018 is dismissed on contest, thereby affirming the judgment and decree dated 20.11.2017 passed by Learned Additional District Judge, 1st Court, Sealdah in O.S. No. 26 of 2013.

43. There will be no order as costs.

44. Interim order/orders, if any, stand vacated.

45. A formal decree be drawn up accordingly.

46. Trial Court records be sent down.

I agree

(Sabyasachi Bhattacharyya, J)

(Uday Kumar, J)