

06.09.2024
Court No.13
Item No.2
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FA 367 of 2013
With
I.A. No. CAN 1 of 2022
Tapas Kumar Banerjee
Vs.
Swapan Kumar Chatterjee & Ors.

Mr. Sibasis Ghosh,
Mr. Dwarikanath Mukherjee,
Mr. Bikram Banerjee,
Ms. Salini Ghosh

..for the appellant

1. The cited persons did not contest the application in the Court below. Special citations issued in the application under Section 276 of the Indian Succession Act, 1975 filed by the appellant in the Court below were also not responded to. This Court as a matter of abundant caution directed substituted service, since they have not appeared here. The Affidavits of substituted service filed in Court today are taken on record.

2. There is nobody to contest the instant appeal, filed against judgement dated 16th March, 2013 passed by the learned Chief Judge of the City Civil Court at Calcutta in Probate Case No. 2 of 2012. By the said judgment, the trial Court dismissed the application for probate.

3. The brief facts of the case are that the appellant sought probate of the Will of his paternal uncle Gouri Sankar Banerjee. Gouri Sankar Banerjee and Shankar

Banerjee are the two sons of late Rampada Banerjee alias Raja Ram Chandra Banerjee and Usha Rani Banerjee, who died on 2nd July, 1956 and 16th September, 1979 respectively.

4. The proceedings in the trial Court were filed by the appellant seeking probate under Section 276 of the Act of 1975 of the Will of late Gouri Sankar Banerjee dated 1st April, 1976.

5. Gouri Sankar Banerjee and Shankar Banerjee are two brothers who were inherited 50% share each in premises Nos. 7/4A and 7/3B, Radhanath Mullick Lane, Calcutta- 700012. Shankar Banerjee died on 2nd October, 1993 and Bina Banerjee, his wife, died on 7th March, 2013.

6. Therefore, Tapas Kumar Banerjee, the appellant herein was the sole successor in the share of Shankar Banerjee although the same is not so germane to the instant proceeding. The 50% share of Gouri Sankar Banerjee in the aforesaid two properties is the subject matter of the Will dated 1st April, 1976 executed by him.

7. Gouri Sankar Banerjee, the appellant's uncle had a wife Jyoshna Banerjee, who had died on 18th November, 2003. They had a son and daughter, viz., Rabi Shankar Banerjee and Runu Chatterjee.

8. Rabi Shankar Banerjee was mentally unsound and single. He died on 13th August, 1978, pre-deceasing his father. Runu Chatterjee died on 7th April, 2000 leaving behind her husband and a son and daughter. The husband Swapan Kumar Chatterjee and children Satabdi Chatterjee and Samrat Chatterjee were issued Special Citations by the Court below. They did not contest the application for probate.

9. It was specifically mentioned in the Will that the appellant-propounder was the executor and would be entitled to apply for probate upon reaching the age of 40. Since the appellant has been staying for more than 4 decades at Gurgaon near Delhi, he has applied for probate after 12 years of the death of the testator.

10. After receiving no response to the special citation, the Court below took up the hearing of the application filed by the propounder.

11. The propounder, Tapas Kumar Banerjee and two of the attesting witnesses of the will of Gouri Sankar Banerjee dated 1st April 1976, namely, Ashim Kumar Bhattacharjee and Anup Mukherjee deposed evidenced in the trial Court. The witnesses proved the signatures as that of the testator. They deposed that the testator executed the Will after understanding its contents out of his own free Will and without coercion or duress. The appellant-propounder was not present when the Will was executed. He was 13 years old.

12. In course of examination, the propounder/appellant/PW-1 stated that he obtained the Will from his mother. He stated that the Will was kept by the testator with his brother Shankar Banerjee (father of the appellant) who gave it to his mother and the mother gave it to him about 8 to 10 years before 2012. He could not apply for probate earlier as he was occupied with his employment/work at Gurgaon near Delhi.

13. The Death Certificates of the children of the uncle, namely, Rabi Shankar Banerjee and Runu Chatterjee and that of the deceased were exhibited in the Court below.

14. Notwithstanding aforesaid, the trial Judge found suspicious circumstances in the execution of the Will and rejected the application for probate.

15. This Court has carefully considered the evidence on record, both oral and documentary. This Court has considered the findings of the Court below. We have no hesitation in holding that the findings are ex facie erroneous and contrary to the evidence that has come on record and the law of the land.

16. It must firstly be noted that the Will and the application under Section 276 of the Indian Succession Act, 1975 were never contested despite Special Citations. There is no contest before this Court despite

notice and service and substituted service by newspaper publication. There is no hesitation in the mind of this Court to hold that the other legal heirs of Gouri Sankar Banerjee, and the husband and children of his deceased daughter Runu Chatterjee, are not interested in the instant proceeding or the property of their father. Admittedly, the properties are lying in dilapidated condition in northern Kolkata.

17. It appears that the deceased testator was an officer/employee of the railways. The Court below gave the following reasons for refusing to grant probate'. The observations of this Court are recorded against each one of them.

(a) The stamp paper on which the Will was written on both sides was purchased in the name of a third party.

It appears that the stamp paper was purchased in the name of an advocate and such stamp paper can be used by any person known to the advocate. While it is true that generally nothing is written on the reverse side of a stamp paper the said rule cannot be applied to unregistered Wills. In fact more credence is lent to such document as it appears to have been prepared by a person who is not legally trained. The stamp paper in the name of the third party cannot be

suspicious circumstance, as it was purchased in the name of an Advocate. Such paper can be used by any person known to such Advocate.

(b) The testator's health and mental capacity to sign on the Will has not been demonstrated by the propounder or the witnesses.

The testator was about 75 years old. Admittedly, he was holding a managerial post in the railways. None of the witnesses have stated that the testator was not in sound health. The signature of the testator appears to this Court to have been executed normally and not unusual. There must therefore be a presumption here that the testator had executed the Will in sound mind and was healthy enough to do so.

(c) There is no evidence to indicate that the Will was prepared on the instructions of the testator by the scribe.

It is not unusual for persons of the generation of the testator to know how to type. Even if he did not type the document, a presumption would follow, given the evidence of the attesting witnesses that the Will was prepared

either by the testator himself or on his clear and direct instructions.

(d) The bequest under the Will appears to be unusual as there are no provisions made for the daughter or the wife.

The testator has stated in the Will that he has clearly made provisions for his daughter's marriage. The wife has been given life interest in the property. The testator had no other male issue surviving. His only son Rabi Shankar Banerjee was mentally unsound and the propounder was given the responsibility of taking care of him. Rabi Shankar Banerjee pre-deceased the testator.

18. It is further specified in the Will that if the propounder dies before the testator or before obtaining probate of the Will, his make lineage would be entitled to seek probate thereof.

19. The aforesaid facts clearly and explicitly indicate that the Will has been executed as per the usual practices and customs followed in the sub-continent. There is absolutely nothing unusual about the contents of the Will or its execution. The will has been proved by the two attesting witnesses.

20. In the above circumstances, this Court is of the view that there are no suspicious circumstances

surrounding the execution of the subject Will. The learned trial Judge committed error in rejecting the application for probate.

21. In such circumstances, this Court directs that Probate shall be granted to the propounder Tapas Kumar Banerjee in respect of the Will dated 1st April, 1976 of late Gouri Sankar Banerjee.

22. Let the trial Court records be sent back for appropriate action by the City Civil Court at Kolkata.

23. FA 367 of 2013 is allowed and disposed of.

24. In view of the above, CAN 1 of 2022 shall also stand disposed of.

25. There shall be no order as to costs.

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

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)