

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

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**FAT 321 of 2011
With
CAN 1 of 2011 (Old CAN 8352 of 2011)
CAN 2 of 2012 (Old CAN 511 of 2012)
Smt. Sandhya Sarkar
Vs.
Sri Prasanta Das and Ors.**

Appearance:

For the Appellant : **Mr. Pinaki Ranjan Mitra, Adv.**

For the Respondent Nos. 7a, 7b, 7c, 8 & 9 : **Mr. Ashim Kr. Roy, Adv.**

For the Respondent Nos. 1 To 6 & 10 & 11 : **Mr. Asit Baran Routh, Adv.
Mr. Surajit Roy, Adv.**

Judgment On : **23.08.2024**

Harish Tandon, J.:

The application for probate filed by the appellant is dismissed by the Probate Court on 25th July, 2011 which is a subject matter of challenge in the instant appeal.

The probate relates to a Registered Will dated 13.07.1999 executed by one Durgabala Dasi bequeathing the property mentioned therein in favour of the beneficiaries named therein. The said testatrix appointed the appellant as executrix to the said Will who was obligated to take a probate of the same and act in terms of the wish and desire of the said testatrix. The said application for probate was filed before the District Delegate, Howrah which was registered as Probate case no. 143 of 2005 wherein the heirs and legal representatives who would otherwise inherit the estate of the said testatrix in case of intestacy were mentioned. After the service of the general and special citation, the caveat was lodged by the Respondent nos. 1 to 3 and an affidavit in support of the said caveat was also filed. Since the District Delegate has no jurisdiction and powers to decide the contested proceeding, it was relegated to the District Judge and ultimately was transferred to the Additional District Judge, 1st Court, Howrah who decided the said proceeding after being converted into a contentious cause upon holding that the Will under scrutiny has prevailed over the Deed of Settlement dated 25.09.1970.

The facts discerned from the record is required to be adumbrated in order to determine whether the Probate Court can go into such question simplicitor on the ground that the objectors have taken such plea. The property originally belonged to one Kali Charan Santra who was admittedly the father of the testatrix. The said owner had four sons namely, Atul Krishna Santra, Fatik Santra, Dulal Santra and Netai Santra and one daughter Durgabala Dasi, the testatrix herein. The said Kali Charan Santra executed a Deed of Settlement dated 25.09.1970 and settled his property in favour of three sons namely, fatik Santra, Dulal Santra and Netai Santra.

Since the Atul Krishna Santra was kept outside the purview of the purported Deed of Settlement, the said son after the death of the Kali Charan Santra filed Title Suit no. 32 of 1973 in the Court of 2nd Sub-Judge, Howrah against the other brothers and the testatrix for decree for declaration that the purported Deed of Settlement dated 25.09.1970 is illegal, invalid and void and consequent thereupon the relief in the form of a partition by separating the shares of the co-sharers was also prayed therein. The said suit was ultimately dismissed on contest. For the purpose of record it is made clear that the said testatrix never appeared and contested the said suit. The Atul Krishna Santra preferred a first appeal i.e., TA 145 of 1978 before the District Judge, Howrah challenging the said judgment and decree of dismissal of the said suit which was transferred to the Court of a 2nd Additional District Judge at Howrah for final disposal. The 1st Appellate Court allowed the said appeal on contest as a resultant effect, the purported Deed of Settlement dated 25.05.1970 was declared invalid, illegal and void with further declaration that the property owned and possessed by said Kali Charan Santra devolved upon his heirs and legal representatives in equal shares. The aforesaid three sons who contested the suit as well as the first appeal filed a second appeal being SA 757 of 1980 before this Court which was initially admitted under Order 41 Rule 11 of the Code of Civil Procedure. During the pendency of the second appeal, one of the appellant namely, Dulal Santra died and his heirs and legal representatives were substituted therein. It further transpires that during the pendency of the said second appeal the other parties also died and the respective heirs and legal representatives were also substituted. Ultimately, the substituted parties in the second appeal entered into a compromise and the compromise

petition containing the terms and conditions of the compromise was filed which was eventually allowed on 11.04.2005. The compromise decree is tendered in evidence and forms part of the record. The parties went in trial and deposed on the basis of their respective stands taken in the probate proceedings. As indicated above, learned District Judge was of the opinion that the question whether the said Deed of Settlement supersedes the Will is the seminal point involved in an application for grant of probate and proceeded to hold that it is so and dismissed the probate application.

The only point in our opinion involved in the instant proceeding is whether the Probate Court can enter into such question being the Court of conscience and whether it exceeds its jurisdiction in passing a decree for declaration to that effect.

The Counsels for the appearing parties are not *ad idem* on the scope and the jurisdiction of a Probate Court and in fact, relied upon a off quoted judgment of this Court rendered in case of **Gopal Chandra Adak vs. Hari Mohan Adak reported in 42 CWN 380**. It is a specific stand of the appellant that the Probate Court has a limited jurisdiction and cannot venture to decide the title of the testator which in fact, has been done in the instant case. On the other hand, the contesting respondents took a plea that the moment the Will is superseded by a purported Deed of Settlement executed by the original owner and the compromise having effected, subsequently the Will has been done away with and, therefore, there is no infirmity and/or illegality committed by the Court below in refusing to grant probate to the purported Will.

Such being the only question involved in the instant appeal, it is an ardent duty of this Court to recapitulate and restate the scope and jurisdiction of the Probate Court and the facet of transgression in the instant appeal. Before we proceed to decide the aforesaid question, the facts as broadly stated hereinabove needs to be scrutinised in minute precision. The purported Deed of Settlement was executed by the original owner on 25.09.1970 wherein one of his son namely Atul Krishna Santra was kept outside the purview thereof. The challenge to the said purported Deed of Settlement was made by the said Atul Krishna Santra by instituting a title suit as mentioned hereinabove which was eventually dismissed but such judgment and decree of dismissal was set aside by the 1st Appellate Court. Though the second appeal was admitted on the notion that it involves a substantial question of law but was ultimately disposed of on the basis of a compromise entered into between the heirs and legal representative of the original parties by virtue whereof they distributed and separated the property owned by the said original owner in terms of the respective allotments.

The objection which runs into several pages filed by the contesting respondents is founded upon an assertion that the description of the property in purported Will was actually not owned by the testatrix in view of the said compromise and therefore, the application for probate is required to be dismissed which has been rightly done by the Probate Court. The emphasis is more put on the assertion that the executrix, the appellant herein was signatory to the said compromise decree and, therefore, she cannot take a rebound and claimed that the entire property owned by the original owner belonged to the testatrix. It is further averred therein that

the said testatrix never executed the purported Will dated 13.07.1999 nor had any testamentary capacity to execute and register the same which leads to an inescapable conclusion that the purported Will is either executed by an imposter or by practicing fraud, coercion, undue influence, misrepresentation. It is further stated that even at the time when compromise having entered into by the parties, the executrix never disclosed the existence of a Will and therefore, such Will cannot be regarded as a genuine and/or legal.

The executrix examined herself to prove the purported Will in solemn form and categorically deposed that the testatrix being the undivided owner of 73 Sataks of land and the building having enjoyed by her during her lifetime she intended to distribute her property to the beneficiaries as her last wish and desire. Undeniably, the testatrix died on 22.03.2001 during the pendency of the said second appeal. It is further deposed that the purported Will was duly registered with the Registrar and was kept in the custody of the learned Advocate who prepared the same and the factum of such Will was subsequently disclosed by the said learned Advocate after the said compromise was effected and the executrix thought it fit to obey and implement such last wish of the testatrix filed the instant application for probate. The executrix did not deny the signature appearing in the compromised petition but sought to give an explanation that at such relevant point of time she was not aware that a Will was executed by her mother. The attesting witness deposed in the probate proceedings that the Will was executed by the testatrix by putting her LTI in his presence and, thereafter they put their signatures. The lawyer who is alleged to have

possessed the said Will was also cited as a witness corroborating the aforesaid fact.

On the other hand, the objector deposed that the compromise decree was passed in respect of the properties which are also included in the Will and therefore, no probate to such Will should be granted. It is sought to be contended that the testatrix did not have a testamentary capacity to execute and register the said Will and, therefore, the Will is out and out false, invalid, manufactured and concocted to grab the entire property.

At the very outset, we must record that apart from a stray averment that the purported Will is a outcome of fraud, coercion, misrepresentation, executed by imposter, no evidence was ever produced in support thereof. The entire objection hovers around the title of the testatrix in respect of the property included in the said Will by virtue of the subsequent compromise having effected between the heirs and legal representatives of the sons and daughter of the original owner i.e., Kali Charan Santra. Before we proceed further it would be prudent to consider the scope and the jurisdiction of a Probate Court and whether the Probate Court can refuse to grant the probate solely on the ground that the parties have entered into an agreement for distribution of the properties and therefore the Will is invalid. Incidentally, the question also fell for consideration as to whether the Probate Court can enter into a title either of the testatrix or the persons claiming under her in pursuit of deciding an application for grant of probate.

The Single Bench judgment of this Court rendered several decades before in **Gopal Chandra Adak (supra)** is relied upon by both the parties on the above issue. According to the Counsel of the respondent, the issue

involved in the instant appeal was directly and substantially an issue involved in the said report wherein a question was whether a family arrangement superseded the Will. As per the respondent Counsel, the Single Bench in the said report held that the moment family arrangement have been entered into by the parties treating the property to have passed on by virtue of an intestate succession it supersedes the Will.

On the other hand, the Counsel for the appellant also relies upon a said judgment to the effect that it has been categorically held that the Probate Court cannot enter into a title and therefore, the question of supersession in a probate proceeding is unwarranted. Since both the parties have relied upon the said judgment it would be relevant and profitable to consider the facts involved therein in order to find out whether the ratio of law laid down therein can be applied in the instant case. After meticulous reading of the judgment in the said report, the Single Bench was considering a case where a suit for declaration that the Will of the father of the parties was superseded by a family arrangement amongst the sons of the testators. In the said report the testator had six sons, one of whom predeceased him. After the death of the testator in the month of February, 1921, the Will was discovered wherein the homestead owned by him was disturbed among the different sons in equal shares barring the two sons and a son of the predeceased son. Such unequal distribution invited a difference amongst his sons and their successors which on intervention of the right spirited persons led to an execution of a family arrangement treating the said testator who having died intestate. Pursuant to the said family arrangement, the properties were divided but after a gap of several years the application for probate was filed. Amidst the pendency of application for probate a

declaratory suit was filed for declaration that the family arrangement entered into between the parties after the death of the testator prevailed over the said Will. The said suit for declaration came up before the Court and in such backdrop of the fact it was declared that the family arrangement would prevail. However, upon embarking the journey on such peripheral, it is categorically held that the genuinity of the Will and its authenticity is within the domain of a Probate Court and, therefore, the Court should not have ventured to decide such issue in a suit of such nature.

On the meticulous reading of the said report, it admits no ambiguity that the Probate Court being the Court of conscience has a limited jurisdiction to authenticate and grant sanctity to the said Will after holding that the same is genuine and duly executed by the testator with free mind and volition. The law is somewhat settled that the Probate Court cannot enter into the title of the testator nor vested with the power to decide the disputed question touching upon the title but exercises its jurisdiction to authenticate the Will as genuine and duly executed by the testator/testatrix which is not shrouded by any suspicious circumstances. The ***Gopal Chandra Adak (supra)*** was decided by a regular Civil Court having power and jurisdiction to pass a decree for declaration and not by the Probate Court. It would not be incorrect to say that even if the probate is granted to the will in solemn form, it does not debar the parties to file a regular suit, for declaration of the title in respect of the properties comprised in the said Will. The aforesaid proposition of law can further be fortified by a judgment of the Division Bench of this Court in ***Uma Adya & Ors. vs. Biren Mondal & Ors.*** reported in (2006) 2 CHN 680 in the following:

“9. It is now settled law that the Probate Court is a Court of Conscience and the duty of the Probate Court is only to adjudicate whether the Will in question was the last Will and testament of the deceased, whether the same was duly executed and attested, whether the same was executed without being vitiated by force, fraud, undue influence, etc. and whether the testator had the required mental capacity to execute the Will. Apart from those questions, a Probate Court cannot go into the question of title of the testator nor can the Court grant a probate which is at variance with the terms of the Will.”

Above quoted observation is further reiterated and restated in a subsequent Division Bench judgment of this Court rendered in case of **Paresh Chandra Majhi & Ors. vs. Biswanath Majhi & Ors. reported in (2009) 3 CHN 612** in the following :

“15. What is more surprising is that the Probate application, although became contentious, was disposed of in terms of compromise which is not permissible under the law of the land. As pointed out by a Division Bench of this Court in the case of A.E.G Carapiet vs. A.Y. Dardarian reported in AIR 1961 Calcutta 559, the Probate Court being a Court of conscience, the Probate cannot be granted on the basis of compromise. In a proceeding for grant of Probate it is the duty of the Probate Court to see whether the Will was the last Will of the testator, whether he had full mental capacity to execute the Will, whether the same was executed and attested after compliance of the requirements of the Indian Succession Act and whether the same was executed without being vitiated by force, fraud, undue influence etc. Apart from those questions, a Probate Court cannot go into the question of title of the testator in the subject-matter of bequest nor can a Court grant a Probate which is at variance with the terms of the Will. (See: Uma Addhya vs. Biren Mondal & Ors. reported in 2006 (2) CHN 680).”

It is thus apparent from the law enunciated in the above reports that the Probate Court assumed a limited jurisdiction to decide whether the Will

being the last one is duly executed by the maker thereof with free mind having testamentary capacity and there is no smoke of suspicious circumstances surrounding the execution of the said Will. It is a duty of the Probate Court while granting the probate to the Will in solemn form to rule out any case of fraud, coercion, undue influence, misrepresentation on the basis of the quality of the evidence adduced before it. To further the aforesaid notion, it is to be remembered that the author of the will is no more in the world and, therefore, his presence cannot be secured to find out his intention behind the making and publishing the said Will. It is a primary duty of the Probate Court to upholding the wish, desire and intention of the maker of the Will, as his last one, without touching upon the disputed question touching the title. It admits no ambiguity in the mind that a person having a testamentary capacity executing a Will disturbs the normal Rule of Succession which is permissible under the Indian Succession Act, 1925. Section 59 of the said Act give sanction to the aforesaid proposition where a person of conscious mind not being the minor is capable of disposing his property as per wish by making a Will. Before the promulgation of the Indian Succession Act, 1925, there was no form or the format or the necessary ingredients to be eminently present in the Will executed by the Hindu but after the promulgation thereof, Section 63 of the said Act contained the requisite ingredients in relation to an unprivileged Will. It is postulated that the testator/testatrix must sign or affix his/her mark to the Will or may be signed by some other person in his presence and under his direction. It further provides that the signature or the mark shall be so placed that it conveys the clear and definite intention of the maker of the said Will for giving effect to the writing as a Will. It further postulates that it

should be attested by two or more witnesses who must see the testator/testatrix signing or affixing his/her mark to the Will or have also seen some other person signing the Will in the presence and by the direction of the testator/testatrix or received from the testator, a personal acknowledgement of his/her signature or mark or of signature of such other person and each such witness must sign the Will in presence of the testator/testatrix. Section 68 of the Evidence Act, 1872 contained a provision relating to the proof of execution of a document required to be attested. It provides that a document which is required in law to be attested shall not be used in evidence until one attesting witnesses, at least, has been called for the purpose of proving its execution. On the combined reading of the aforesaid provisions and the law enunciated in the above reports, it is abundantly clear that the Probate Court cannot transgress its powers and jurisdiction to decide whether the Will is superseded by the Deed of Settlement dated 25.09.1970. In our opinion, the Probate Court have wrongly framed the question whether the Deed of Settlement dated 25.09.1970 supersedes the Will or not as it was beyond its competence and jurisdiction to enter into such aspect.

We would not have ventured to proceed further after upholding that the Probate Court cannot decide the title of the parties in the properties yet to bring more clarity it would be apposite to make certain observations. The aforesaid question was misplaced and cannot germinate even on facts on the basis of the stand and the evidence given by the parties. Admittedly the purported Deed of Settlement dated 25.09.1970 was executed by the original owner i.e. Kali Charan Santra settling his properties in favour of some of his sons depriving one of the sons namely Atul therefrom. The Atul instituted

title suit before the Civil Court not only for a decree for declaration that the purported Deed of Settlement is invalid and void but also for separation of the shares inherited by the heirs and legal representative of the said original owner under the ordinary Law of Succession. Initially the suit was dismissed but such decree of dismissal was set aside by the First Appellate Court. The effect of the decree of the First Appellate Court leads to an inescapable conclusion that the said purported Deed of Settlement was declared as invalid and/or void and not binding upon the parties. During the pendency of the second appeal, the compromise was effected amongst the heirs and legal representative of the original parties and, therefore, the decree to the effect that the purported Deed of Settlement dated 25.09.1970 remained invalid, inoperative and void stand at the face of the parties yet, the parties foregone their respective stands and distributed the properties amongst themselves and, therefore, the issue that the said Deed of Settlement dated 25.09.1970 supersedes the Will could not have been the seminal point to decide. The moment the parties have compromised and distributed the properties de hors the said Deed of Settlement, the Deed of Settlement has no binding effect and in fact superseded by the said compromise.

In whatever angle we look at and in order to avoid any ambiguity, the Probate Court is denuded of power to decide the title of the parties in relying ratio laid down in Gopal Chandra Adak (*supra*) which was in fact, a suit instituted before the Civil Court who was otherwise competent to enter into the title of the parties despite the Will being probated by a Probate Court.

The order suffers from illegalities, infirmities and in contravention with the law laid down in this regard and, therefore, cannot be sustained.

The impugned order is thus, set aside.

The appeal is allowed, consequent whereupon the application for grant of probate is allowed.

The Probate Court is directed to issue a probate to the appellant after fulfilling all other formalities required in this regard within four weeks from the date of the communication of this judgment. Let the LCR arrived to this Court be sent down through special messenger at the cost of the appellant which shall be put in within a week from date.

The appeal and applications are thus disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Prasenjit Biswas, J.)