

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Gaurang Kanth**

F.A.T. No. 433 of 2017

**Arup Kumar Chakraborty & Anr.
Vs.
Smt. Aloka Chakraborty & Anr.
with**

F.A.T. No. 435 of 2017

**Arup Kumar Chakraborty
Vs.
Smt. Aloka Chakraborty & Ors.**

For the appellants/petitioners : Mr. Partha Pratim Roy
Mr. Sounak Bhattacharya
Mr. Abhirup Halder
Mr. Sounak Mandal
Mr. A. Saha Ray

Hearing concluded on : 03.12.2024

Judgment on : 05.12.2024

Sabyasachi Bhattacharyya, J.:-

1. The present two first appeals arise out of a common judgment and separate decrees passed in connection with two proceedings for grant of probate of two different Wills of the same testator, namely Priya Mohan Chakraborty (since deceased). O.S. 8 of 2008 was filed by the

respondent no. 1 Smt. Aloka Chakraborty, the widow of the testator, seeking probate of a Will dated March 8, 2006 whereas O.S. 9 of 2008 was filed by the appellant no. 1 Arup Kumar Chakraborty for probate of a Will dated May 5, 2006.

2. Both applications turned contentious and were registered as suits, which were heard analogously and decided by a common judgment and separate decrees. The testamentary court granted probate in respect of the earlier Will dated March 8, 2006, in which respondent no. 1 Aloka was the beneficiary, and dismissed the probate suit with regard to the later Will dated May 5, 2006, where Aloka had a life interest but Arup was the ultimate beneficiary. Being thus aggrieved, Arup and his brother Swarup have preferred both the appeals and Aloka, their mother, and Manjushree, their sister (daughter of the testator), are arrayed as respondents.
3. The respondents were initially represented through counsel; however, subsequently said counsel retired since they did not have further instruction to appear. Hence, as per the direction of this Court, the appellants served notice of pendency of the appeal on the respondents directly. Despite service, the respondents chose not to appear. Thus, the appeal was taken up for hearing ex parte.
4. Learned counsel for the appellants argues that the learned trial Judge disbelieved the execution of the Will dated May 5, 2006 inter alia on the basis of a stray sentence in the cross-examination of D.W.1 Swapan Chakraborty dated August 21, 2013 where he stated, "I cannot recollect the execution of the Will-in-question". However, in the rest of his

evidence, the said attesting witness of the aforesaid Will consistently stated that he and the other attesting witnesses signed the Will in presence of the testator and the testator also signed in their presence.

5. It is contended that since the two probate suits were heard analogously, both the Wills were being alternately tendered to the witnesses and it is doubtful as to which Will the witness was referring to in the said statement. In fact, later on in his cross-examination, D.W. 1 stated that he does not know whether Priyanath executed any Will on March 8, 2006, thus raising the presumption that he was referring to the other Will earlier.
6. D.W.1 was held to be an “interested witness” by the trial Court, which is disputed by learned counsel appearing for the appellants. In his cross-examination, the said witness in fact says categorically that he is not a relative of the testator. Thus, the said finding is perverse.
7. Dilip Chakraborty, a brother of the testator, was apparently an attesting witness in both the disputed Wills. The learned trial Judge drew adverse inference against the present appellant no.1, who was the propounder of the Will dated May 5, 2006, for not examining the said attesting witness to dispel doubts. However, learned counsel for the appellants argues that the appellant no. 1 had made an application for examination of Dilip Chakraborty on commission because of his advanced years. However, the said application was kept pending and the probate suits were disposed of without adjudicating upon the said application. Rather, the respondents did not make any endeavour to

call the said witness. Hence, such conclusion of the learned trial Judge is contrary to evidence and thus perverse as well.

- 8.** Again, the learned trial Judge disbelieved the Will dated May 5, 2006 on the premise that no document was produced to show that the testator used to put his full signature in documents. However, the signature on the said Will has not been disputed by the respondents, since they took a plea that such signatures were obtained on blank papers which were later converted to the Will. Moreover, the two documents produced by the respondents to show short signatures of the testator were pension documents, where people may put short signatures in the natural course of events.
- 9.** The learned trial Judge also found that there was no signature of the testator at the end of the Will dated May 5, 2006. However, the exhibited Wills show that the reality was just the converse – the testator signed on every page and at the end of the contents of the Will dated May 5, 2006 whereas his short signatures are depicted on the pages of the Will dated March 8, 2006 and the said Will does not contain the testator's signature at the end.
- 10.** Another reason for the learned Trial Judge disbelieving the Will dated May 5, 2006 was that since the testator had executed a gift deed in favour of the appellant no. 1 (ultimate beneficiary of the said Will), nothing prevented the testator from donating the property which is the subject-matter of the Will as well to the donee by that gift deed. However, it is pointed out by learned counsel for the appellants that life interest was given to the respondent no.1/wife of the testator in the

said Will; hence, it was the obvious reason for not transferring the said property outright to the appellant no. 1 by the gift deed.

- 11.** Learned counsel for the appellants lastly seeks to point out several contradictions in the evidence of the plaintiff's witnesses regarding proof of the purported Will dated March 8, 2006.
- 12.** Whereas the learned trial Judge held that the said Will was drafted at Asansol and handed over to the testator by the scribe Tarapada Mudi in Kolkata on March 6, 2006, the evidence of respondent no. 1 (P.W.2) and respondent no. 2 (P.W.1) was that the Will was handed over to the testator on March 6, 2006 in Asansol, and not Kolkata.
- 13.** Furthermore, the appellants exhibited prescriptions and an ECG report issued at Kolkata, which were proved by a person from the concerned diagnostic center, to show that the testator was being treated and medically examined in Kolkata on March 3, 2006 and March 5, 2006, which is contrary to the statement of P.W. 2 (respondent no. 1) that the testator was in Asansol from the last part of February, 2006 till March 7, 2006.
- 14.** It is argued that since the Will dated May 5, 2006 was executed subsequent to the March 8, 2006 Will, and the execution and attestation of the May 5, 2006 Will has been duly proved by corroborative evidence, the said subsequent Will prevails over the earlier Will in any event.
- 15.** Also, learned counsel for the appellants contends that the execution of the purported Will dated March 8, 2006 ought to have been disbelieved because of the above discrepancies in the evidence of the witnesses

supporting it and due to the suspicious circumstance that there was no signature of the testator at the end of the contents thereof.

16. Learned counsel for the appellants cites a Division Bench judgment of this Court in *Pranati Ghosh and Others vs. Anil Kumar Ghosh*, reported at 2022 SCC OnLine Cal 2736, for the proposition that even if the witnesses have no recollection of having witnessed the Will, presumption of due execution applies where there is a proper attestation clause.
17. Upon hearing the arguments and going through the materials on record, we arrive at the following conclusions:
18. The learned Trial Judge has primarily proceeded to disbelieve the Will dated May 5, 2006 on certain technicalities. The first ground on which the learned Trial Judge held against the said Will was that D.W.1 namely Swapan Chakraborty, one of the attesting witnesses of the said Will, stated in his cross-examination on August 21, 2013, that he cannot recollect the execution of the “Will-in-question”. However, we find from the deposition of the witnesses that both the Wills, respectively dated May 5, 2006 and March 8, 2006, were alternately tendered to the witnesses in their cross-examination. The evidence of both D.W.1 and D.W.2 reveals that they were confronted with both the Wills in random order. It is quite understandable that since both the probate cases were being heard analogously and evidence was led in common, both the Wills would come up for being tendered in cross-examination. As such, the said statement of D.W.1 should be taken in proper perspective. The exact question which was put to the witness is

not before us. The only clue to his answer lies in the expression “Will-in-question”, which could refer to either of the said Wills. Thus, the said stray statement of the witness had to be read in proper perspective, by reading the entire evidence as a whole and not in isolation.

- 19.** We find from the examination-in-chief of D.W.1 that he has consistently stated that the testator executed the Will in presence of the attesting witnesses, including himself, and that the attesting witnesses signed in front of the testator, thus complying with the requirements of Section 63 of the Indian Succession Act, 1925 as well as Section 68 of the Indian Evidence Act. In fact, later on in his cross-examination on the same day, D.W.1 stated that he does not know whether Priyanath (the testator) executed any Will on March 8, 2006. Thus, reference in the ‘incriminating’ sentence to the March 8, 2006 Will cannot be ruled out altogether. In such view of the matter, since the execution and attestation of the Will dated May 5, 2006 was sufficiently proved by corroborative evidence both by D.W.1 and D.W.2, the said observation of the learned Trial Judge was perverse.
- 20.** It is a well-settled principle of law that the standard of proof of a Will is similar to other documents, barring the extra yardsticks incorporated in Section 63 of the Indian Succession Act, 1925 which were duly proved in the present case.
- 21.** D.W.1 Swapan was found by the learned Trial Judge to be an “interested witness”. However, in his cross-examination dated August 21, 2013, Swapan categorically states that he is not a relative of the

testator. It was coincidental that the surname of the said witness tallied with that of the testator and the propounder. However, since there is nothing on record to show any prior connection between the said attesting witness and the propounder of the Will dated May 5, 2006, the aforesaid observation of the learned Trial Judge was without any material basis whatsoever.

- 22.** Again, the learned Trial Judge drew adverse inference against the appellant no.1 for not calling Dilip Chakraborty, one of the attesting witnesses in both the Wills, as witness to shed more light on the matter. The said approach was palpably contrary to the records. We find from the records that an application was duly filed by the appellant no.1 in his probate case for examination of the said Dilip Chakraborty, the other attesting witness, on commission, keeping in view his advanced years. The learned Trial Judge disposed of the probate cases without adjudicating on such application.
- 23.** On the contrary, the respondents did not ever call for Dilip Chakraborty to adduce evidence. Rather, a written objection was filed by the respondents to the application of the appellant no.1 to examine Dilip on commission. It was equally incumbent upon respondent no.1 to prove the true state of affairs by calling Dilip as a witness, since the latter was an attesting witness to both the Wills. Instead of doing so, the respondent no.1 opposed the prayer for adduction of evidence by Dilip. As such, it was the respondent no.1 against whom adverse inference ought to have been drawn and not the appellant no.1.

- 24.** Again, the learned Trial Judge found that the appellant no.1 did not bring on record any other document to show that the testator put his full signature on documents. Such consideration, however, is a non-issue, since the full signatures of the testator on the Will dated May 5, 2006 was admitted. The respondents did not dispute the signatures but pleaded that the same was obtained on blank papers. The particulars of such alleged fraud were never pleaded, nor was it independently proved, therefore belying the said allegation. In any event, since the signatures were not disputed, the learned Trial Judge acted contrary to law in disbelieving the Will dated May 5, 2006. Certain documents were produced by the respondents where the testator allegedly put his short signatures. Those documents are documents relating to pension where, in natural course of events, one could very well put his short signature. The said documents neither proof the Will dated March 8, 2006, nor do they disprove the Will of May 5, 2006.
- 25.** The learned Trial Judge also proceeded to observe that there was no signature of the testator at the end of the Will dated May 5, 2006. By so observing, the learned Trial Judge inverted the issue on its head. The records bear out just the contrary – that the testator did not put his signature at the end of the contents of the Will dated March 8, 2006 whereas his full signature appears at the end of the Will dated May 5, 2006, apart from the other pages of the latter Will. Hence, it was the Will dated March 8, 2006 which should have been disbelieved on such count, since the signature of the testator on the same did not appear in

a place to show the intention of the testator to give effect to the document as a Will, as mandated by Section 63 (b) of the Indian Succession Act.

- 26.** The learned Trial Judge proceeded on conjecture to observe that the testator could very well have transferred the subject-property of the Will dated May 5, 2006 to its propounder, the appellant no.1, in the gift deed executed in favour of the said appellant on July 11, 2003. However, in doing so, the learned Trial Judge overlooked that in the Will dated May 5, 2006, the appellant no.1 was only the ultimate beneficiary and a life interest was retained in favour of respondent no.1, the wife of the testator. The said fact clearly explains why the property was not transferred by virtue of the gift deed, intending to confer life interest on the testator's wife during her lifetime, which could not have happened if title to the property was transferred *inter vivos* to appellant no. 1 by the gift deed.
- 27.** Hence, in view of the Will dated May 5, 2006 having been proved fully in accordance with law, the learned Trial Judge acted *de hors* the law and in a perverse manner in disbelieving the same. Accordingly, even in the absence of any contrary evidence to disprove the prior Will dated March 8, 2006, probate ought to have been granted in respect of the May 5, 2006 Will and not the earlier Will, since the May 5, 2006 Will was the last Will and Testament of the testator, having been executed subsequent to the March 8, 2006 Will.
- 28.** However, we find ample evidence from the records to disbelieve the Will dated March 8, 2006 as well.

- 29.** The learned Trial Judge recorded in the impugned judgment that in reply to a question from the court, P.W.1 replied that Tarapada Mudi, the scribe of the purported Will dated March 8, 2006, brought the Will from Asansol to Kolkata on March 6, 2006, and handed over the same to the testator in presence of P.W.1 and her mother, that is, the present respondents. Such stand, however, is contrary to the evidence of both P.W.1 and P.W.2 who stated in their evidence that the Will was handed over the testator on March 6, 2006, not in Kolkata but in Asansol.
- 30.** Again, the very fact that the Will was drafted and prepared in Asansol by a scribe whereas the same was executed in Kolkata raises a question as to whether the Will was prepared as per the dictates of the beneficiary of the same or the testator.
- 31.** Another discrepancy is borne out by Exhibits 'F' and 'F/1', which are respectively a prescription dated March 3, 2006 and an ECG report dated March 5, 2006 in respect of the testator. Both the said documents were proved by a person from the concerned diagnostic centre as D.W.3 and were issued at Kolkata. The said two documents show that the testator was in Kolkata immediately prior to the execution of the Will dated March 8, 2006. At least for March 3 and March 5, 2006, there is evidence on record to indicate the testator's presence in Kolkata. However, P.W.2 (respondent no.1), the beneficiary of the purported Will dated March 8, 2006, stated in her cross-examination that the testator was residing at Asansol all along from the last part of February, 2006 till March 7, 2006. Hence, a doubt arises as to the veracity of the deposition of P.W.1 and P.W.2 on relevant

aspects of the conception and execution of the Will. That apart, as the learned Trial Judge rightly pointed out (but ascribing it to the wrong Will), we find that there is no signature of the testator at the end of the contents of the Will dated March 8, 2006, as opposed to the Will of May 5, 2006.

32. Another facet of the matter cannot be lost sight of. Section 63(b) of the Indian Succession Act, 1925 stipulates that the signature or mark of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. The said provision, however, is defied in case of the purported Will dated March 8, 2006, since there is no signature of the testator at the end of the contents of the Will to signify the conclusion of the same. Although the same, by itself, might not be fatal for proving the Will, in the facts of the case and in the teeth of the patent contradictions in the evidence of the plaintiff's witnesses who adduced evidence to prove the Will dated March 8, 2006, we find that the circumstances under which the said Will was allegedly executed were dubious.

33. Since the very presence of the testator in Asansol during the planning and drafting of the Will, as sought to be projected by P.W.1 in her cross-examination, is belied by the documents showing the testator's presence in Kolkata at the relevant juncture, a further question arises as to why the Will was drafted and prepared in Asansol and presented to the testator only a day prior to the execution of the same. We are, thus, of the opinion that the propounder of the said Will, that is, respondent no.1 has failed to dispel such suspicious circumstance. As

such, we hold that the due execution and attestation of the Will in terms of Section 63 of the Indian Succession Act could not be proved by the propounder. Accordingly, the learned Trial Judge acted *de hors* the law in overlooking such error in granting probate of the said Will.

- 34.** However, the judgment of *Pranati Ghosh (supra)* cited by the appellants is not germane for the present consideration, since there was no separate attestation clause in the Will dated May 5, 2006. However, the ratio laid down therein is also rendered redundant in the present context, since we have observed above that the stray sentence in the cross-examination of D.W.1 to the effect that he cannot recollect the execution of the Will might not have pertained to the Will dated May 5, 2006 at all and, read in the context of the entire evidence of D.W.1, is otiose.
- 35.** On the basis of the discussions made above, we arrive at the conclusion that the impugned judgment and the consequential decrees are bad in law and are tainted by patent perversity inasmuch as those overlook vital evidence and rely on certain extraneous factors, such as placing overreliance on non-production of any document showing full signature of the testator.
- 36.** Accordingly, F.A.T. No. 433 of 2017 with F.A.T. No.435 of 2017 are allowed on contest, thereby setting aside the judgment and decree refusing probate in respect of the Will executed by Late Priya Mohan Chakraborty on May 5, 2006 and granting probate of the Will dated March 8, 2006 executed by the same testator. The common judgment and separate decrees dated April 27, 2017 passed by the learned

Additional District Judge, Tenth Court at Alipore, District: 24 Parganas in O.S. No.8 of 2008 and O.S. No.9 of 2008 are accordingly set aside. Probate is hereby granted in respect of the Will dated May 5, 2006 in favour of the propounder/executor/appellant no.1. The probate granted by the trial Court in respect of the Will dated March 8, 2006 is set aside.

- 37.** The appellants are at liberty to pursue the necessary formalities and ministerial acts for actual grant of probate in terms of the present decree at the earliest.
- 38.** There will be no order as to costs.
- 39.** A formal decree may be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Gaurang Kanth, J.)

Later

On the prayer of the appellants, the appellants are directed to put in Special Messenger Cost for sending down the Trial Court Records. Accordingly, the Trial Court Records be sent down at the earliest.

(Sabyasachi Bhattacharyya, J.)

(Gaurang Kanth, J.)