

Item-
2. 31-07-2025

FA 186 of 2015

sg Ct. 16

Chayna Karmakar
Versus
Sudhir Karmakar & Ors.

Mr. Saswata Bhattacharyya
Ms. Sima Ghosh
...for the appellant
Mr. Rajeev Bhattacharya
Mr. P. Saha
...for respondents

Soumen Sen, J. (Oral)

1. The holographic will of Umapada Karmakar is the subject of challenge in a testamentary proceeding filed by Sudhir Karmakar as one of the executors of the said Will.
2. Umapada, during his lifetime, registered a Will on 6th July, 1969 and also executed a registered gift deed in favour of the plaintiffs and also gift deeds in favour of Bidhan Karmakar. After the death of his first wife, he married Lakshmibala Karmakar and the present appellant is the wife of Bidhan Karmakar who was born in the wedlock of the second marriage.
3. The probate proceeding was marked as a contentious cause in which the appellant has raised three issues – firstly, that the application for grant of probate was filed after 20 years of the death of the testator; secondly, the will is not proved in accordance with Section 63 of the Indian Succession Act, 1925 and, thirdly, a bequeath was made in favour of the person who was not yet born on the date of execution of the will.
4. The learned Counsel appearing on behalf of the appellant

has referred to the evidence of the parties and submitted that the deed of gift which was marked for identification as exhibit 'Y' has not seen the light of the day and although Bidhan was the beneficiary of the said deed of gift that does not prove the Will unless proved in accordance with Section 63 of the Indian Succession Act. It is submitted that none of the attesting witnesses have been examined nor there was any conclusive evidence before the learned Trial Court that the attesting witnesses are not alive.

5. Per contra, the learned Counsel for the respondents has submitted that Umapada Karmakar married twice. The respondents are the sons of the first wife. The appellants are the legal heirs of the son of the second wife. From the first marriage, Umapada had two sons and three daughters and from the second marriage, he had two sons. Umapada, apart from the Will, had also executed two gift deeds and gifted some properties to the sons of the first wife and some properties to the second wife. The Will is proved by three persons, who have duly identified the signatures of the testator and also the signatures of the attesting witnesses. Since the witnesses of the last will died by the time the grant of probate was ripe for hearing, PW-2 being the near relative of Satyaban Kaibarta and Ajit Kr. Kaibarta identified their signatures as witnesses. PW-3 also identified the signature of Radha Gobinda Sadhu being one of the witnesses of the Will. DW-1, in his cross-examination, has specifically stated that he was

not born at the time the Will was executed. Further DW-1 denied about the gift deed executed by his mother in his favour. The signature of the testator and witnesses have been duly identified and the appellants did not produce any evidence stating that the testator was infirm or bedridden at the time of execution of the gift deed.

6. It appears from the Will as well as gift deeds that Umapada was worldly wise person and he anticipated that there could be ill-feeling and ill-will in future between the legal heirs of the sons and daughter of the first marriage and sons from the second marriage. If the Will and the deeds of gift are read as a whole, one could get an impression that he made equal distribution of the assets and properties between the legal heirs from the first marriage and the legal heirs from the second marriage.
7. There is a clear mentioning of the gift deeds in the registered Will. Umapada, apart from being the scribe of the said Will and it was in his own hand writing, had it registered to obviate all future controversy. There is no evidence suggesting that before the application for probate was filed, anyone has started ascertaining his right in respect of any properties covered therein and for the purpose of limitation, there has to be an assertion and denial of rights thereby giving a cause of action for the purpose of calculating the period of limitation under Limitation Act. Moreover, the Limitation Act by itself does not apply to a grant of probate as an order in a

probate proceeding is an order in rem and it is the duty of the Court to ensure that the wishes of the testator are respected and the factum of delay is viewed in certain situations to deny the grant of probate as often it is considered to be a species of the broad spectrum of suspicious circumstances. In fact, Bidhan during the cross-examination admitted of the existence of the deeds of gift that was marked for identification and he assured the Court that he would produce the original gift deed. Once it is in his custody and he has accepted the benefit under the said deed of gift, he cannot turn around and dispute a recital in the Will which has referred to the said deeds of gift in favour of Bidhan.

8. There is an equitable distribution of the assets and properties of Umapada amongst his legal heirs. Insofar as the attesting witnesses are concerned, there is positive evidence that they are not available, however, the persons who have deposed are the near relations of the attesting witnesses and they have identified the signatures. Moreover, the judgment passed in *Ashutosh Samanta (D) by Lrs. & Ors. Vs. Sm. Ranjan Bala Dasi & Ors.* reported in **2023 SCC OnLine SC 255** has clearly stated in paragraph 19 after considering Section 69 of the Evidence Act that in the event where attesting witnesses may have died or cannot be found, the propounder is not helpless as Section 69 of the Evidence Act, 1972 would be applicable. The Hon'ble Supreme Court in arriving at the said conclusion has referred to its earlier decisions as

would be evident from paragraphs 17 and 18, which are stated below:

17. Section 69 was also considered in K. Laxmanan v. Thekkayil Padmini:

"Since both the attesting witnesses have not been examined, in terms of Section 69 of the Act it was incumbent upon the Appellant to prove that the attestation of at least one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. DW 3, who was an identifying witness also in Ext. B-2, specifically stated that he had not signed as an identifying witness in respect of Ext. B-2 and also that he did not know about the signature in Ext. B-2. Besides, considering the nature of the document which was a deed of gift and even assuming that no pleading is filed specifically denying the execution of the document by the executant and, therefore, there was no mandatory requirement and obligation to get an attesting witness examined but still the fact remains that the Plaintiff never admitted the execution of the gift deed and, therefore, the same was required to be proved like any other document."

18. V. Kalyanaswamy (D) by L.Rs. v. L. Bakthavatsalam (D) by LRs., too, considered the effect of Sections 68 and 69, and observed as follows:

"70. Reverting back to Section 69 of the Evidence Act, we are of the view that the requirement therein would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be in his handwriting. In other words, in a case covered Under Section 69 of the Evidence Act, the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed

with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered Under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting. The language of the Section is clear and unambiguous. Section 68 of the Evidence Act, as interpreted by this Court, contemplates attestation of both attesting witnesses to be proved. But that is not the requirement in Section 69 of the Evidence Act."

9. On such consideration, we do not find any reason to interfere with the order passed by the learned Trial Judge. The appeal fails. However, there shall be no order as to costs.
10. Urgent Photostat certified copy of this order, if applied for, be supplied to be parties upon compliance of all requisite formalities.

(Soumen Sen, J.)

(Apurba Sinha Ray, J.)