

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

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Subhendu Samanta**

F.A.T. No.393 of 2014

**Sri Jagadindra Ganguly
Vs.
Irena Dutta and another**

For the appellant : Mr. Debashis Roy,
Ms. Oisani Mukherjee,
Mr. Monish Sen

Hearing concluded on : 06.01.2025

Judgment on : 09.01.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred against a judgment and order (deemed decree) dismissing the application for grant of probate of the Will of one Late Renuka Dutta.
2. The Will-in-question was executed on January 16, 2003 and the testatrix died on February 01, 2007.
3. Learned counsel for the appellant submits that the Will having been proved duly in accordance with Section 68 of the Indian Evidence Act, 1872 as well as Section 63 of the Indian Succession Act, 1925, the

learned Trial Judge erred in law and in fact in dismissing the probate application.

4. Learned counsel submits that the mere erroneous mention of date at the bottom of the last page of the Will does not vitiate the execution of the Will, since one of the attesting witnesses adduced evidence to prove the execution of the same.
5. The overwriting of date by the scribe/executor, it is submitted, is also not fatal in respect of the valid execution of the Will.
6. Learned counsel contends that the Bengali Year 1409, in which the Will was executed, corresponds to the English Year 2003, contrary to the finding of the learned Trial Judge that the said Bengali Year corresponds to the year 2002 of the English calendar.
7. It is next argued that the testatrix having signed at the bottom of the last page of the Will does not in any manner vitiate the Will or its execution.
8. Although the P.W.1 (executor) might have failed to state in evidence specifically whether the Will was signed in his presence, the same was unnecessary, it is argued.
9. P.W.2, one of the attesting witnesses, having not corroborated the presence of P.W.1 at the time of the Will being signed is also immaterial, it is contended. Also, it is argued that the advanced years of the testatrix does not *ipso facto* render her mentally unsound.
10. The probate case was marked as contentious and was ultimately heard upon citation being issued initially on the son of the deceased testatrix,

who was her only surviving heir. The said son having expired during pendency of the proceeding, his heirs and legal representatives were substituted and notice served on them. However, the said heirs did not contest the probate proceeding at any point of time.

- 11.** Although learned counsel for the appellant contends that the said heirs wrote letters to the probate court expressing their consent to the grant of probate, there is nothing on record to substantiate such submission and, as such, we are not going into such aspect.
- 12.** From the records, it is seen that P.W.2, one of the attesting witnesses, namely one Krishnendu Kar, duly proved the execution of the Will in terms of Section 63 of the Indian Succession Act. He clearly stated that the testatrix signed the Will in his presence and in presence of the other two attesting witnesses and that he and the other attesting witnesses signed the Will in presence of the testatrix.
- 13.** It has also been stated in evidence by the P.W.1 that the Will was duly read over and explained to the testatrix.
- 14.** In the Will itself, the executor/scribe, who is also the propounder of the Will, has stated that the Will was prepared as per instructions given by the testatrix and the contents of the same were explained to the testatrix.
- 15.** The probate court observed that although the Will-in-question was notarised and allegedly executed on January 16, 2003 and in all other places the date mentioned was January 16, 2003, on the last page of the Will, the date of execution was mentioned as January 16, 2005.

However, the erroneous mentioning of date in one of the stray places, on the last page of the Will, immediately above the signature of the testatrix, does not *per se* vitiate the execution of the Will. No effective purpose would be served for anyone by attributing the date wrongly to the year 2005, whereas the consistent case of the propounder as well as the witnesses is that the Will was executed on January 16, 2003 and not on January 16, 2005. The notarization took place on the said date and in all other places apart from the stray mention of 2005 on the last page, the date of execution of the Will was duly mentioned as January 16, 2003.

- 16.** We find that there has been no challenge to the execution of the Will by the heirs of the testatrix. The signature of the testatrix on the Will has also not been challenged. In view of the signature being authentic, the mere mis-description of date in one place thereof could not be construed as fatal to the proof of the Will.
- 17.** Learned Additional District Judge has also taken exception to the date as put by the scribe/executor having been overwritten. However, we have carefully perused the original Will and found that immediately beside such overwriting, which ultimately mentioned the date as January 16, 2003, the scribe/executor put his short signature. Hence, it cannot be said that the said date was interpolated or overwritten later, as the Will was notarized with such short signature of the scribe beside the date.

- 18.** In fact, on a composite reading of the Will, we find that there was every possibility that it is the scribe/executor who initially mentioned the date erroneously in two places, beside his signature and above the signature of the testatrix, as January 16, 2005 instead of January 16, 2003. The said fact is evident from the overwriting on the date next to the signature of the scribe, which was rectified by putting the scribe's short signature against the same. However, the date given above the signature of the testatrix was inadvertently omitted to be corrected.
- 19.** In any event, no useful purpose would be served for a person who might have intended to manufacture the Will by putting a subsequent date in one of the stray places in the Will. Thus, the wrong mentioning of 2005 instead of 2003 as the date of execution of the Will on the fifth page thereof is obviously a *bona fide* error which is immaterial for the purpose of adjudicating on the authenticity of the Will and/or its execution. Hence, the learned probate court erred in law in taking into account such irrelevant criterion to disbelieve the valid execution of the Will as a whole.
- 20.** Insofar as the opinion of the learned Trial Judge that the Bengali Year 1409 mentioned in the Will corresponds to the English Year 2002, the same has been proved to be wrong by learned counsel for the appellant during arguments. The said Bengali Year corresponds to the English Year 2003 and the exact date of execution of the Will, that is, January 16, 2003 is corroborated by the Bengali date given therein. Thus, the

impugned judgment is perverse to such extent insofar as it disbelieves the Will on the said ground.

- 21.** The learned probate court held that there was no reason for the testatrix to sign at the bottom after the signature of the typist whereas she had signed on the right-hand top corner of every page. However, there is not rule against the signature of the testatrix being put both at the right-hand top corner and the bottom of the Will by the testatrix. Rather, such excess (if it can be called so) operates in favour of valid execution of the Will, since the absence of a signature at the bottom of the Will might have cast some shadow of doubt on the valid execution of the same.
- 22.** Section 63(b) of the Indian Succession Act 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 signature of the testatrix in the present case at the bottom of the Will, over and above the top right-hand corner of every page, serves precisely such purpose and, as such, should have been construed in favour of validity and authenticity of the Will rather than against it. Thus, the impugned judgement is perverse on such count as well.
- 23.** The legal yardsticks applied by the learned probate court were, thus, extraneous to the law governing the field.
- 24.** Again, the probate court has observed that the P.W.1 (executor) failed to state in his evidence whether the Will was signed in his presence or in presence of the attesting witnesses. The law, however, does not

require the executor or the scribe to say so. The mandate of Section 68 of the Evidence Act is that at least one of the attesting witnesses has to prove the execution of the Will, which has been done in the present case and would suffice to prove the valid execution of the Will.

- 25.** P.W.1, the executor/scribe, sufficiently proved that the Will was drafted as per the instructions of the testatrix and that it was executed in presence of three attesting witnesses. The said stand was corroborated by P.W.2, one of the attesting witnesses, as per the requirement of law. Absence of a specific statement of the executor to the effect that the attesting witnesses signed in his presence of that the Will was signed in his presence is entirely irrelevant in the context.
- 26.** Insofar as the learned Trial Judge having cast suspicion on the execution of the Will and the mental capacity of the testatrix due to her advanced years is concerned, the said premise is contrary to law. Rather, it is well-settled that mere advanced age of the testatrix (87 years in the present case) *per se* does not indicate lack of sound mental capacity of the testatrix to execute a Will of her own free will and volition.
- 27.** The sound mental capacity and physical health of the testatrix at the relevant juncture has been proved by P.W.1 in his evidence and has not been rebutted from any corner. In the absence of anything to the contrary, there was no occasion for the probate court to disbelieve such statement of the executor. Moreover, the nature and firmness of the signature of the testatrix, and the consistency of such signature on

every page, which is evident from a bare perusal of the Will, go on to show that the testatrix was in sound mental and physical capacity at the relevant juncture. Also, the notarization of the same, in the absence of any rebuttal, ought to be construed to create a presumption in favour of validity and authenticity of the execution of the Will.

- 28.** In fact, Section 68 of the Evidence Act mandates that only one of the attesting witnesses is required to prove the valid execution of the Will, which has been done by P.W.2 in the present case. The statement of P.W.2 in his evidence that there were three attesting witnesses including himself is corroborated by the signatures of the three attesting witnesses on the Will itself.
- 29.** Thus, on a comprehensive perusal of the materials on record, we find that the probate court relied on extraneous circumstances and arrived at certain perverse findings contrary to the records, on the basis of mere conjecture, to disbelieve the valid execution of the Will, despite the same having been proved duly in consonance with Section 68 of the Evidence Act as well as Section 63 of the Indian Succession Act.
- 30.** In such view of the matter, the appeal succeeds.
- 31.** Accordingly, F.A.T. No.393 of 2014 is allowed, thereby setting aside the impugned judgement and deemed decree dated May 6, 2014 passed by the learned Additional District Judge, First Court at Burdwan, District: Burdwan in O.S.(Will) No.01 of 2013, whereby the application for probate of the Will of late Renuka Dutta was dismissed.

- 32.** Consequentially, the probate of the last Will and testament of Late Renuka Dutta dated January 16, 2003, is hereby granted. The appellant is granted leave to approach the probate court for taking necessary ministerial steps for the actual grant of such probate in favour of the appellant at the earliest. If so approached, the probate court shall take immediate steps to ensure the same.
- 33.** There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

I agree

(SubhenduSamanta, J.)