

Form No. J (2)

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

FA 88 of 2022

Bijaylaxmi Ghosh alias Mili alias Babli Ghosh alias Mily Ghosh

vs.

Alolika Guha & Anr.

with

FAT 707 of 2018

Bijaylaxmi Ghosh alias Mili alias Babli Ghosh @ Mily Ghosh

Vs.

Alolika Guha & Anr.

For the Appellant : Mrs. Sohini Chakraborty, Advocate
Mr. Arijit Sarkar, Advocate

For the Respondents : Mr. Probal Kr. Mukherjee, Senior Advocate
Mr. Rajat Dutta, Advocate

Heard on : 15.01.2025 and 16.01.2025

Judgment on : 16.01.2025

DEBANGSU BASAK, J.:-

1. Two First Appeals are heard analogously as they are between the same parties and are directed against the common judgment and order disposing of two proceedings which were heard analogously by the learned Trial Judge.
2. F.A. No.88 of 2022 is directed against the order dated September 29, 2018 passed by learned District Judge Special Court at Balurghat, District-

Dakshin Dinajpur in O.C. Suit No.2 of 2008 while FAT No.707 of 2018 is directed against the order dated September 29, 2018 passed in Misc.Case No.2 of 2006 (Probate Suit no.11 of 2003).

3. Learned advocate appearing for the appellant submits that, the appellant is the daughter of deceased testator. The testator left behind a Will dated September 10, 1996 (hereinafter referred to as the first Will). Testator expired on October 19, 2002. The testator was survived by his widow, daughter and son at the time of his death.
4. Learned advocate appearing for the appellant submits that, the application for grant of Probate of the first Will of the testator was registered as Probate Suit No.11 of 2003. Probate of the first Will was granted on September 29, 2005.
5. Learned advocate appearing for the appellant submits that, the son of the testator thereafter, applied for grant of probate of a document claimed to be the Will of the testator dated June 23, 2001(hereinafter referred to as the second Will). Son of the appellant also applied for revocation of the grant of Probate of the first Will. Application for grant of Probate of the second Will of the testator was registered as OC Suit No.2 of 2008. Application for revocation of the Probate of the first Will was registered as Misc.Case No.2 of 2006.

6. Learned advocate appearing for the appellant submits that, appellant filed a suit being Title Suit No.49 of 2005 seeking partition of the immovable properties. Such suit is still pending.
7. Learned advocate appearing for the appellant submits that, the son of the testator expired on July 25, 2015. On his death, the wife, daughter and son were substituted as plaintiffs in O.C. No.2 of 2008 and petitioners in Misc.Case No.2 of 2006. O.C. No.2 of 2008 and Misc.Case No.2 of 2006 were heard analogously.
8. Learned advocate appearing for the appellant submits that, prior to the death of the son of the testator, he affirmed an affidavit-in-chief in OC Suit No.2 of 2008 as also Misc.Case No.2 of 2006. Such affidavit was treated as examination-in-chief at the trial of the two proceedings. Daughter of the deceased son was examined as plaintiff witness no.1 at the trial. In the two suits, in aggregate the respondents herein as plaintiffs/petitioners at the trial examined three witnesses, namely, the daughter of the deceased son of the testator, the alleged scribe of the alleged second Will, as also the alleged attesting witness of the alleged second Will. They were examined as Plaintiff Witness (PW) Nos.1, 2 and 3 respectively.
9. Learned advocate appearing for the appellant submits that, P.W.1, in a deposition did not advance the case of the respondents herein in the sense

that, she did not testify that, she was a witness to the Will, saw the testator execute the Will or saw any of the attesting witness, witnessing the execution of the Will.

10. Learned advocate appearing for the appellant then draws the attention of the Court to the deposition of P.W.2 who is said to be the scribe of the alleged Will. She submits that, P.W.2 deposed that, he did not receive any instruction from the testator to write the second Will.
11. Learned advocate appearing for the appellant then draws the attention of the Court to the deposition of the P.W.3 who is claimed to be one of the attesting witnesses of the Will. She points out that, P.W.3, in examination-in-chief stated that, the second Will was executed at the office of the scribe, that is, P.W.2 while in cross-examination P.W.3 stated that, the second Will was executed at a hotel room just opposite the court premises.
12. Learned advocate for the appellant draws the attention of the Court to Exhibit-1 which is the second Will. She submits that, the Second Will is alleged to be executed on a stamp paper which is dated October 4, 1972. She submits that, the case of the appellant before the trial court was that, the testator was a businessman. For the purpose of his business, he executed a number of documents including stamp papers in the blank. It is the case of the appellant that, two of the stamp papers so executed by the appellant were used for setting up the claim of the second Will. She

contends that, there are suspicious circumstances in relation to the execution of the second Will. According to her, respondents did not establish the execution of the Will or its attestation by requisite number of witnesses for the Court to grant of Letter of Administration as done by the impugned order. In support of such contention, she relies upon **(2023) 9 Supreme Court Cases 734 (Meena Pradhan and Ors. vs. Kamla Pradhan and Anr.)**.

13. Learned advocate appearing for the appellant submits that, the Probate of the first Will of the testator was revoked on the ground of existence of the second Will. She submits that, the second Will was not proved in Court in accordance with law. Therefore, the question of grant of Letters of Administration in respect of the second Will does not arise. Consequently, the revocation of the Probate granted in respect of the first Will was erroneous. She submits that, the impugned order be set aside.
14. Learned Senior Advocate appearing for the respondents submits that, second Will of the deceased was duly proved at the trial. In support of his contention, he has drawn the attention of the Court to the deposition of P.W.3 and OPW 3. He submits that, OPW 3 accepted that the second Will of the deceased was executed by the deceased. He refers to the deposition of OPW 3 in this regard.

15. Learned Senior Advocate appearing for the respondents submits that, when the execution of the Will was accepted on behalf of the appellant, then the issue of the signature of the testator not been marked as an exhibit is a non issue. In any event, the matters may be remanded to the Trial Court for recording evidence on such issue.
16. Learned Senior Advocate appearing for the respondents submits that, all ingredients for the purpose of proving execution of the second Will stood complied with by the respondents at the Trial Court. According to him, learned Trial Judge rightly granted Letters of Administration in respect of the second Will of the deceased and revoked the probate granted in respect of first Will of the deceased.
17. The subject-matter of the appeals relates to two Wills both claimed to be of Ranendra Mohan Guha, since deceased. Ranendra Mohan Guha expired on October 19, 2002 leaving behind him surviving his widow, a son and a daughter. Appellant is the daughter of late Ranendra Mohan Guha, since deceased.
18. Widow of Ranendra Mohan Guha, since deceased, applied for grant of Probate of the first Will of Ranendra Mohan Guha, since deceased, by way of Probate Suit No.11 of 2003 as executrix and beneficiary. Probate in respect of the first Will of Ranendra Mohan Guha was granted on June 29, 2005.

19. Appellant before us filed civil suit for partition of the assets of Ranendra Mohan Guha, since deceased in its entirety. Such suit for partition was registered as Partition Suit No.49 of 2005. Such suit is pending.
20. Thereafter, son of late Ranendra Mohan Guha filed O.C. No.2 of 2008 seeking Probate in respect of the second Will of Ranendra Mohan Guha, since deceased. Son unfortunately, expired on July 25, 2015. On his death, his wife and daughter were substituted as plaintiffs in O.C. No.2 of 2008 and petitioners in Misc. Case No. 2 of 2006.
21. Prior to his death, son of Ranendra Mohan Guha, since deceased affirmed an affidavit which was treated as examination-in-chief in O.C.No.2 of 2008 and Misc.Case No.2 of 2006. Subsequent to his death, his daughter was examined as P.W.1 in O.C. No.2 of 2008 and Misc.Case No.2 of 2006.
22. P.W.1 in her deposition stated that, she was not aware of the execution of the second Will.
23. Respondents herein examined the scribe of the second Will as P.W.2. P.W.2 turned hostile. On cross-examination of P.W.2 subsequent to him being declared as hostile on the prayer of the respondents, he stated that, he never scribed any deed without any signature of the executants. When shown the second Will which was marked as Exbt.-1 at the trial, P.W.2 stated that, no such space was available in Exbt-1 for writing “read over and explained the contents to the executant.” Apart from that, he stated

that, the testator was not present at the time of writing Exbt-1. He also stated that, Exbt-1 was written by him as told to him by P.W.3.

24. P.W.3 in his deposition stated that, the testator executed Exbt-1 which was written at the office of P.W.2. He also claimed that, Exbt-1 was written as per the instruction of the testator. In cross-examination, P.W.3 stated that, Exbt-1 was written at a hotel room situated at the opposite foot of the court building. In cross-examination, he stated that, Exbt-1 bears the stamp of October 4, 1972 on the overleaves of pages 1 and 2 and that Exbt-1 contains the words “for Ranendra Mohan Guha” in both the pages at the bottom part.
25. At the trial, appellant examined three witnesses. Relevant amongst the three witnesses is OPW 3. Learned Trial Judge placed reliance on the deposition of OPW 3 where, she stated that, the Exbt-1 was executed by the testator.
26. In course of hearing of the appeal, we called for Original Will being Exbt-1 which was in the safe custody of the department. Exbt-1 was perused by us yesterday in open Court. Learned counsels for the respective parties were also allowed inspection of the Original Will being Exbt-1.
27. Signature of the testator in Exbt-1 is not marked as an exhibit at the trial. However, signatures of other persons appearing in Exbt-1 were marked as exhibits at the trial. Exbt-1 claims that there are two attesting witnesses.

One of the attesting witnesses is P.W.3 while the other is OPW 3. On scanning the evidence of P.W.3, we do not find any deposition of P.W.3 to the effect that, he saw the other attesting witness which is OPW 3 to sign the second Will, Exbt-1 in presence of testator and in his presence.

28. OPW 3 who is stated to be the other attesting witness in Exbt-1, also does not state that, the two attesting witnesses saw the testator execute the Exbt-1 as a Will and that, they saw each other sign Exbt-1 or testator acknowledged that, the other attesting witness executed the Exbt-1.
29. Essential ingredients of Section 63 of the Indian Succession Act, 1925 were not established at the trial in respect of Exbt-1. Firstly, signature of the testator was not marked as exhibit. Secondly, ingredients of execution and attestation of second Will were not established. There is variance as to the place of execution of Exbt-1 on the version of PW 3 with him stating that Exbt-1 was executed at the office of PW 2, in examination in chief while stating that the same was executed at the hotel room in cross examination. PW 2 stated that Exbt-1 was written as per the instruction of PW 3 while PW 3 stated that it was done as per instruction of the testator.
30. There is one more aspect to the entire scenario. In cross-examination, P.W.3 did not deny that the testator was unwell. In response to a question, he stated that, he cannot say whether the testator was unwell

prior to his death. There are two statements to such effect in cross-examination by P.W.3.

31. Exhibit 1 contains a signature which is claimed to be that of the testator under a writing “for Ranendra Mohan Guha”. It is acknowledged by the parties that, Ranendra Mohan Guha, since deceased, was a businessman.
32. Appellant ran a case before the Trial Judge that, Ranendra Mohan Guha, since deceased during his lifetime as a businessman, kept a number of documents signed in the blank. The signature claimed to be that of the testator in the stamp paper, purchased on October 4, 1972 was made when the stamp paper was blank. It was subsequently filled up as the second Will allegedly executed on June 23, 2001. These factors raise suspicion which was not adequately answered or dispelled by the respondents at the trial.
33. Existence of suspicious circumstances relating to execution of Exbt-1 assuming that Exbt-1 was executed, was not dispelled, for the learned Trial Judge to proceed to grant the Letters of Administration as sought to be done.
34. ***Meena Pradhan and Ors. (supra)*** is of the view that apart from statutory compliance, in respect of a grant of probate of a Will it needs to be proved that, the testator signed out of his own free Will at the time of execution, he was of a sound state of mind, aware of the nature and effects thereof

and that the will was not executed under any suspicious circumstances.

In the facts of the present case, these essential ingredients were not established at the trial.

35. It is contended on behalf of the respondents that, suit may be remanded for fresh trial with regard to the marking of exhibits of the signature of the testator given the nature of evidence already on record.
36. With respect, we are unable to accede to such a request in the facts and circumstances of the present case. Remand cannot be made for the purpose of curing the lacuna in the case of the plaintiffs. Parties were well aware of the requirement of law to obtain grant of a probate of a Will.
37. In view of the discussions above, impugned order dated September 29, 2018 passed by the learned District Judge, Special Court, Balurghat, Dakshin Dinajpur in OC No. 02 of 2008 and Misc. Case No. 02 of 2006 are set aside. Probate granted in Probate Suit No. 11 of 2003 is restored.
38. FA 88 of 2022 and FAT 707 of 2018 are **disposed of** without any order as to costs.

(Debangsu Basak, J.)

39. I agree.

(Md. Shabbar Rashidi, J.)

CHC/Dd