

FAT 210 of 2011

**Puja Basu Roy Chowdhury and Anr.
Vs.
Smt. Dipa Basu Roy Chowdhury**

Mr. Rwitendra Banerjee
Mr. Bratin Kumar Dey
Ms. Anjana Banerjee
Mr. Subhankar Banerjee
Mr. Romit Bose

... For the Appellants.

Mr. Gopal Chandra Ghosh, Senior Advocate
Mr. Subrata Ghosh
Ms. Suravi Ghosh

... For the Respondent.

1. The subject appeal is directed against judgement and decree dated 30th March, 2011 passed by the learned Additional District Judge, 2nd Court, Barasat, 24 Parganas (North) in O.S. No.9 of 1993. By the said judgement, the Trial Court had granted probate of the Will of one late Nani Gopal Basu Roy Chowdhury dated 6th December, 1987.

2. The fact of the case and the evidence on record indicates that the testator was a headmaster by profession and also a political worker. He was adamant headstrong and did not listen to the advice of anybody. He, however, took the help of his students in preparation and execution of the Will.

3. The family of the testator comprised of a pre-deceased wife and a second wife. The testator bequeathed under the Will in question his estate primarily to his daughter-in-law, who is the wife of the son born out of

wedlock with the first wife, Tarun Kanti Basu Roychowdhury.

4. Admittedly, the Will indicates that the beneficiary live with the same house and took good care of him. The son and daughter-in-law born out of the second marriage of the testator did not care much about him.

5. It is equally a proven fact that the testator during the last stages of his life had very poor vision. He executed several letters written down by the beneficiary daughter-in-law from his first marriage.

6. The Will, however, was executed sometime in December 1987. The letters in question were written in 1981 onwards.

7. Upon an application for probate under Section 276 of the Succession Act, the Will came to be cited. The daughter out of the first marriage objected to the Will and grant a probate. She contended that the testator was not of sound mind and was with diminished vision he could not have signed the Will. She also contended that the Will prepared fraudulently.

8. The signature on the Will was, however, not disputed by the objector. It appears from the evidence of D.W.-2, husband of the objector daughter, that he conducted most of the affairs including the litigation in question on behalf of his wife.

9. The Will was witnessed by two persons namely Shri Arun Baran Chakraborty and Shri Khagendra Nath Saha. Shri Khagendra Nath Saha alone deposed as the attesting witness. He is stated that the testator read out the Will to him whereafter he put his signature. The Will was admittedly in a type written form. The exact place of execution and attestation of the Will are not clear from the evidence on record.

10. However, given the facts scenario as a whole, this Court is of the view to that the Will was executed in the house of the testator. The Will was, however, typed at a substantial distance from the house at the District Court at Alipore by a scribed called Arabinda Ghosh, who was not, however, examined.

11. Learned counsel for the appellant legal representative of the son from the second wife of the testator has argued that the text of the Will indicated that the Will was signed and witnessed by the testator and the attesting witnesses in front of each other. While the attesting witness before the Trial Court had stated that the Will was witnessed only in the presence of the testator, who had read out the Will to him. He had not deposed anything about the signature of the second witness.

12. This Court has considered the arguments in the light of the two decisions cited by the learned counsel for the appellants in the case of ***Meena Pradhan and Ors. Vs. Kamla Pradhan and Anr.*** reported in ***(2023) 9 SCC***

734 particularly paragraphs 10, 12 and 13 thereof and in the case of ***Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh and Ors.*** reported in **(2009) 4 SCC 780** particularly paragraph 13 thereof. Our views as regards the applicability and upshot of the aforesaid two judgments shall be discussed in the context of the other points argued by the learned counsel for the appellants.

13. The second argument advanced against the grant of probate by the Trial Court is that if admittedly, the testator was a diminished vision, he could not have being in a position to sign and execute the Will.

14. It is thirdly argued that Exhibit-5 being a pension dispensation form produced by P.W.-1 could not have in the custody of either of the testator or P.W.-1. The same is a document of the Government. There are therefore suspicious circumstances surrounding the executor of the Will and the testamentary capacity of the testator in this regard.

15. Having carefully considered the arguments of learned counsel for the appellants, this Court is of the view that the essence of the judgement of ***Meena Pradhan and Ors (supra)*** espoused in paragraphs 10.2, 10.9, 11 and 13 need consideration and are set out hereinbelow:-

“10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

.....

10.9. The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;

.....

11. In short, apart from statutory compliance, broadly it has to be proved that : (a) the testator signed the will out of his own free will, (b) at the time of execution he had a sound state of mind, (c) he was aware of the nature and effect thereof and (d) the will was not executed under any suspicious circumstances.

.....

13. As far as allegations made by the defendants are concerned, we are of the opinion that there is no evidence on record to conclude that the deceased was not in a fit or stable mental condition at the time of execution of a will, or that a will was executed under suspicious circumstances, or the presence of any element of undue influence.”

16. The upshot of the aforesaid observations the Hon’ble Supreme Court indicate that while it is true that execution of the Will is required to be proved in terms of the provisions of Section 63 of the Succession Act read with Section 68 of the Evidence Act. There is no need for any mathematical precision to be applied. It is essentially the conscience of a Court that would determine as to whether a Will has been bona fide executed by the testator and as to whether there are any suspicious circumstances in the bequeath under the Will. It only then that a Will can be

declared as not proved. Production of a doubtful pension paper is not a suspicious circumstance surrounding the bequeath under a Will.

17. It appears from the facts on record that while it is true that one of the attesting witnesses has clearly proved the execution of the Will, the non-mention of the other executing witness and/or the non-production would not ipso facto become fatal to the execution of the Will. This is particularly in the light of the fact that D.W.-1 has not disputed the signature of the testator on the Will. In so far as the testamentary capacity is concerned, it is now well-settled that merely because a person is of diminished vision his mental alertness cannot by itself be negated. Even if a person is afflicted with any ailment that would also not negate the mental alertness, capacity and the ability to execute a Will.

18. In the light of the above, the second argument of learned counsel for the appellants cannot be accepted.

19. In so far as the statements in the Will that the attesting witnesses and the testator signed and executed the Will in the presence of one another and in front of each other, this Court is of the view that since the Will was typed at a different place and executed at the residence of the testator, the typed written portion of the Will in question must have been done mechanically and the testator had signed the Will and had the same witnessed

as per his wisdom. This argument of learned counsel for the appellants is, therefore, rejected.

20. This Court does not find any unusual bequest of the Will. It is quite possible that the testator, who was taken due care of by his daughter-in-law from the first wife, who also lived in the same premises as the testator, could be a lawful beneficiary under the Will. There can be no suspicious circumstances in this regard. The testator has also mentioned as to why he wanted to deprive the daughter from the first wife and his son from the second wife of any benefit of his estate. They stayed away from him and did not take care of him. It may not be out of place to mention that the testator made due provision for his family pension to go to his second wife.

21. Having regard to the bequeath as above, this Court does not find any suspicious circumstances whatsoever in the bequest under the Will. Reference in this regard is made to the classical decision of ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma*** reported in **1958 SCC OnLine SC 31**.

22. In view of the aforesaid discussions, this Court finds no reason to interfere with the impugned judgement and grant of probate of the Will of late Nani Gopal Basu Roy Chowdhury dated 6th December, 1987.

23. Before parting with the judgement, this Court would like to record its appreciation for the efforts put in by Mr.

Rwitendra Banerjee in conducting the appeal effectively and sincerely on behalf of his client.

24. Accordingly, FAT 210 of 2011 is dismissed. Consequently, connected application, if any, is also dismissed.

25. Interim orders, if any, shall stand vacated.

26. There shall be no order as to costs.

27. Let the TCR be returned to the Court below along with the original Will.

28. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Rai Chattopadhyay, J.)