

(1993) 03 OHC CK 0015
In the Orissa High Court
Case No : M.A. No. 341 of 1991

Bishnupriya Mohapatra and Others

APPELLANT

Vs

Bata Krushna Mohapatra and Others

RESPONDENT

Date of Decision : 12-03-1993

Acts Referred:

Succession Act, 1925 — Section 59, 63, 74

Citation : AIR 1993 Ori 218

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : Ashok Mukherjee, for the Appellant; S.S. Basu, A.S. Naidu and P. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—This is an appeal u/s 299 of the Indian Succession Act against an order of the Subordinate Judge, Puri, granting probate in respect of the Will executed on 5-10-1969 and directing issuance of Letter of Administration in favour of the applicant Batakrushna (respondent No. 1).

2. One Gangadhar had two sons Balamukunda and Gopinath. Batakrushna is the son of Balamukunda and claims to be the adopted son of Gopinath. Said Batakrushna filed application u/s 278 of the Indian Succession Act before the Subordinate Judge, Puri, alleging that Gopinath had executed a Will in his favour on 5-10-1979 when the applicant was a child and said Gopinath died on 10-7-1971. It was pleaded in the application that Gopinath executed the will in a sound state of disposition in presence of two attesting witnesses and attesting witnesses attested the same in presence of the testator and the scribe. The applicant was unaware of the execution of the aforesaid will till 1986 and the document had been kept in an almirah inside a room. On coming to know of the document, the application was filed u/s 278 of the Indian Succession Act.

3. The present appellants who are some of the defendants before the

Subordinate Judge contested the proceeding, but other defendants did not contest. The contesting defendants denied the allegation of adoption by Gopinath. It was also further averred that the applicant has fraudulently manufactured the will to deprive the contesting defendants of their legitimate right. It was also pleaded that after the death of Gopinath, a Commissioner was appointed to make an inventory of the properties of the suit house, but the will was not found in the said inventory and obviously the same was manufactured at a later stage. It was further pleaded that Gopinath had two wives, Ratnamani and Bishnupriya and Bishnupriya's children are Ushamani, Aditya Kumar, Ambika Prasad and Abhaya Kumar, which has already been decided in O. S. No. 100 of 1976. In that civil suit, Batakrushna also pleaded to be the adopted son of Gopinath, but that was negatived. According to the contesting defendants, Gopinath having wives and children, there was no occasion for executing a will in favour of Batakrushna who is the brother's son of the executant and this Will has been manufactured after the death of Gopinath.

4. On these pleadings, the learned Subordinate Judge framed as many as 7 issues. On issues Nos. 2 and 3 which relate to the genuineness and validity of the Will executed by Gopinath, the learned Subordinate Judge came to hold that the testator voluntarily executed the Will while in sound disposing state of mind understanding the nature and effect of the disposition made by him in presence of the attesting witnesses and the Will is genuine and was validly executed and is not a forged and manufactured document. On issue No. 4, the learned Subordinate Judge came to hold that the present proceeding is not barred by res judicata and the decision of the earlier partition suit which is now sub judice in appeal before the High Court cannot operate as res judicata. On issue No. 7, it was found that the testator has executed the will with respect to his eight annas interest in the scheduled properties and under the Hindu Succession Act, the interest of the testator in the joint property can be bequeathed by executing a Will. Consequently, the suit property described in the schedule is in conformity with the schedule of the Will. On issues Nos. 1 and 6. it was found that the probate proceeding is maintainable and the applicant is entitled to the relief sought for. On these findings, the Will was probated and a direction was given to issue the Letter of Administration in favour of the applicant and hence the present appeal.

5. Mr. Mukherjee, the learned counsel for the appellants, contends that the conclusion of the Subordinate Judge that the Will is genuine and valid and is not a forged one and the testator executed the same in a sound state of disposition is contrary to the evidence on record and the said conclusion cannot be sustained in appeal. In elaborating this argument, Mr. Mukherjee submits that the suspicious circumstances in the case, to be enumerated hereunder, make the onus very heavy on the propounder and the propounder has not discharged the burden that lay on him and consequently, the court should be reluctant to treat the document as the last will of the testator. The learned Subordinate Judge, in fact, has failed to appreciate the evidence in its proper perspective in recording

his findings on the question of genuineness of the Will in question. According to Mr. Mukherjee, the suspicious circumstances are (i) non-production of the Will in the earlier partition suit and its delayed production after fifteen years of the death of the executant; (ii) though the family properties were listed and an inventory was made in course of the partition suit, the document does not find place there; (iii) the vagueness of the description of the property in the Will; (iv) disposition of the property of Gopinath in favour of Batakrushna under the Will in the presence of wives and children of Gopinath; and (v) absence of any certificate by the attesting witnesses that it was executed in their presence. In addition to the aforesaid suspicious circumstances, Mr. Mukherjee contends that since no doctor has been examined to state about the mental condition of the executant on the date of execution of the Will and the signature of the testator on the Will is in a different ink than the body of the document, and further signature of Gopinath on the Will is different from the admitted signature of Gopinath on other documents like Ext. Y, the learned court below should have held the document to be a forged one. The learned counsel also contends that even on the Will all signatures except the signature of the testator himself having borne dates, this fits in with the theory that the document was scribed on a blank paper bearing the signature of Gopinath. Lastly, Mr. Mukherjee urges that the evidence of P.Ws. 2, 3 and 4 and D.W. 3 has not been properly scrutinised.

Mr. Basu appearing for the respondent No. 1, on the other hand, contends that the delay in production of the will ipso facto cannot be a ground to dub the Will to be forged if there is sufficient explanation for the delay in question, as has been held by the Privy Council in the case of AIR 1945 105 (Privy Council) . He further contends that under the Will only Ac. 1.00 of land had been bequeathed in favour of the propounder though Gopinath's share upon partition is 2.00 acres and, therefore, it is not correct that the entire property was bequeathed under the Will. Mr. Basu also urges that there has been absolutely no pleading that Gopinath was mentally deranged and, at any rate, the evidence of D.W. 5 itself disproves the defendants' case of executant not being in a sound state of disposition by the time of execution of the Will. So far as the non-production of the document in the partition suit and its non-mention in the inventory are concerned, Mr. Basu says that the Commissioner who had prepared the inventory having been examined as D.W. 4 and having categorically stated that he did not make any inventory in respect of the ground floor rooms and the Will having been found in an almirah on the ground floor room, there is no justification to make any adverse comment on that score. According to Mr. Basu, all the relevant materials having been examined and the propounder having discharged the burden that lay on him, the conclusion of the learned Subordinate Judge will be unassailable.

6. Before examining the relevant evidence to appreciate the points urged, I think it appropriate to notice the position of law indicated in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . Their Lordships of the Supreme Court indicated the duty of the Court in appreciating evidence and

proof of a Will as well as the onus of such proof on the propounder. Applying their mind to the provisions of Sections 45, 47, 67 and 68 of the Evidence Act as well as Sections 59 and 63 of the Indian Succession Act, their Lordships held that a party propounding a will or otherwise making a claim under a Will is no doubt seeking to prove a document and in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of document and in this connection provisions of Sections 67 and 68 of the Evidence Act as well as Sections 45 and 47 of the said Act are to be borne in mind. It was further held that the question as to whether the Will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions and the same has to be proved like any other document except as to the special requirement of attestation prescribed by Section 63 of the Indian Succession Act. Since a Will speaks from the death of the testator and when it is propounded or produced before the Court, the testator has already departed the world which introduces an element of solemnity in the decision on the question as to whether the document is the last document of the testator, the Court will hold the same enquiry and the propounder will have to establish by satisfactory evidence that the Will was signed by the testator; that the testator at the relevant time was in a sound and disposing state of mind; that he understood the nature and effect of the disposition and put his signature to the document of his own free will. The learned Judges in the said case further observed that there may be cases in which the execution of the Will may be surrounded by suspicious circumstances like the alleged signature of the testator may be shaky and doubtful and evidence in support of the propounded case that the signature is that of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be feeble and debilitated and the evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the disposition made in the Will may appear to be unnatural, improbable or unfair in the light of several circumstances. The presence of such suspicious circumstances naturally tends to make such initial onus heavy and unless it is satisfactorily discharged, the courts would be reluctant to treat the document as the last will of the testator. The learned Judges finally held that for deciding material questions of fact which arise in an application for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. But it may be stated generally that a propounder of the Will has to prove the due and valid execution of the Will and if there are any such suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

The aforesaid decision was followed in the case of Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, , and their Lordships of

the Supreme Court held that if suspicious circumstances appear to be there attending the execution of the Will, then the propounder must remove the doubts by clear and satisfactory evidence and if the propounder succeeds in removing the doubts then the Court would grant probate even though the Will might be unnatural and might cut off wholly or in part other relations.

A Division Bench of the Calcutta High Court considered this question in the case of Anath Nath Das and Others Vs. Sm. Bijali Bala Mondal, and held that a propounder of the Will has to prove the due and valid execution of the Will and if there are suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence.

This being the position of law, let me now examine the alleged suspicious circumstances as urged by Mr. Mukherjee for the appellants to find out whether, in fact, those can be termed as suspicious circumstances and if so, whether the propounder has been able to remove the suspicions by satisfactory evidence.

7. One of the main contentions of Mr. Mukherjee is non-production of the Will in course of the Title Suit and non-enlistment of the same in the inventory that was prepared in course of the Title Suit (O. S. No. 100 of 1976). In the said suit, there is no dispute that an inventory had been prepared of all the properties of the family and the Will does not find mention in the same. The Commissioner who had prepared the inventory has been examined as D. W. 4 in the present proceeding and in his evidence he categorically stated that he had not prepared any inventory in respect of the ground floor rooms. The positive case of the propounder being that the Will was found in an almirah in one of the ground floor rooms, non-mention of the same in the inventory prepared during the earlier civil suit cannot be held to be a suspicious circumstance. The testator having executed the Will on 5-10-1969 died on 10-7-1971 and the propounder was a child then. The evidence of the propounder indicates that the male members of his family died and he has no occasion to know about the existence of the Will in one of the ground floor rooms inside an almirah and in course of his search he having found the same, filed the application for probating the same. Though he has been cross-examined at great length, but nothing has been elicited to discredit his version. In the aforesaid circumstances, non-production of the Will for this length of time cannot be held to be a suspicious circumstance to doubt the genuineness of the Will and, at any rate, the explanation offered is convincing and has to be accepted.

The next suspicious circumstances, according to Mr. Mukherjee is the non-production of the Will in the earlier partition suit. But as has been stated earlier, since the existence of the Will was not known to the propounder, non-production of the same in the partition suit cannot be said to be a suspicious circumstance at all.

The next circumstance according to Mr. Mukherjee which raises suspicion about

the genuineness of the Will is the disposition of the entire property of Gopinath in favour of the propounder over in the presence of his wives and children and the vagueness of the description of the property in the Will. The aforesaid contention is based on a thorough misreading of the Will inasmuch as though Gopinath had interest to the extent of Ac. 200.00 in the joint family property, but under the Will only Ac. 1.00 was bequeathed in favour of the propounder and, therefore, it cannot be considered to be a suspicious circumstance in any view of the matter. Then again, on going through the Will, I am not in a position to subscribe to the view of the learned counsel for the appellants that the description is vague or indefinite. In this view of the matter, the contention of Mr. Mukherjee on this score is wholly devoid of any force.

Mr. Mukherjee then contends that the absence of any certificate by the attesting witness that it was executed in their presence in the Will itself makes the Will doubtful, But on being asked as to whether this is a requirement of law, Mr. Mukherjee frankly conceded that the law does not require for appending such a certificate in the Will. In the absence of a legal requirement to the aforesaid effect, I see no justification in the contention that the Will must be looked with suspicion merely because it does not bear a certificate of the attesting witness that it was executed in his presence. That apart, the attesting witness was examined as a witness in this case and he categorically stated about the fact of attestation in presence of the testator and the fact of execution by the testator in presence of the attesting witnesses and that satisfies the requirement of law. The evidence of the attesting witness has not been shaken in any manner and consequently, the Will cannot be looked with suspicion merely because it does not bear a certificate of the attesting witness to the effect that he attested the document in presence of the testator.

According to Mr. Mukherjee, non-examination of a doctor to indicate the sound state of mind of the testator at the time of execution of the Will must be held to be fatal. I am unable to persuade myself to agree to the aforesaid contention of the learned counsel for the appellants. The scribe has been examined as P.W. 3 and he categorically stated in his evidence that at the time of execution of the Will Gopinath was in sound state of mind and health and he scribed the document under the instruction of said Gopinath. He further stated that he read over and explained the contents of the Will to Gopinath and the attesting witnesses were present there and then Gopinath signed the document in presence of the attesting witnesses and the attesting witnesses attested the same. Though there has been lengthy cross-examination of this witness, but nothing has been elicited to discredit him. The evidence of the scribe has been fully corroborated by the evidence of the attesting witness (P.W. 4). He also stated about the sound state of mind and health of Gopinath at the time of execution and that the scribe came in his presence and scribed the document according to the instruction of Gopinath. He also establishes about his attesting the document in presence of Gopinath and Gopinath executing the same in his presence. In view of the aforesaid trustworthy evidence, it is difficult to accept

the contention of Mr. Mukherjee, the learned counsel for the appellants, that the propounder should have examined a doctor to prove the mental condition of the testator at the time of execution of the Will, Then again, the evidence of D.W. 5 disproves the case of the defendants that Gopinath was not in a sound state of mind at the time of execution of the Will. That apart, Gopinath died roughly two years after the execution of the Will and was in a perfect state of mind even till his death. I have, therefore, no hesitation to reject the submission of Mr. Mukherjee for the appellants that non-examination of a doctor to indicate the state of mental condition of the executant is to be viewed with suspicion.

Mr. Mukherjee also advanced lengthy arguments on the question of the signature of Gopinath being at variance with the admitted signature. But as it transpires the Will (Ext. 6) was examined by a Handwriting Expert who had compared the signature of Gopinath on the Will with his admitted signatures and who came to the conclusion that it was the signature of the testator Gopinath. He has been cross-examined at great length and nothing has been elicited from him. Even on examining different documents admittedly bearing the signature of Gopinath, it appears that somewhere he has signed (Pi) and somewhere he has signed as (Pee). In that view of the matter and in view of the evidence of the Handwriting Expert, it has been rightly held that the Will bears the signatures of the testator Gopinath and nobody else and, therefore, Ext. 6 has been rightly held to be a genuine document and not a forged one.

In the aforesaid circumstances, in my considered opinion, the finding of the learned trial Judge that the Will is genuine, valid and was duly executed by the testator after knowing fully the contents thereof remains unassailable and cannot be interfered with. I am also of the considered opinion that there appears no suspicious circumstances attending the execution of the Will and suspicion, if any, has been duly explained by the propounder therefore the and, said Will has been rightly probated and the learned Subordinate Judge has rightly issued direction for issuance of letter of Administration.

8. All the contentions of Mr. Mukherjee having failed, this appeal fails and is dismissed, but in the circumstances, there will be no order as to costs.