

(1976) 03 GAU CK 0001

In the Gauhati High Court

Case No : Letters Patent Appeal No. 2 of 1974

Chandra Kanta Medhi and others

APPELLANT

Vs

Lakheswar Nath and others

RESPONDENT

Date of Decision : 08-03-1976

Acts Referred:

Evidence Act, 1872 — Section 68, 74

Succession Act, 1925 — Section 15, 270, 276, 283, 283(1)(c)

Citation : AIR 1976 Guw 94

Hon'ble Judges : D. Pathak, J;Baharul Islam, J

Bench : Division Bench

Advocate : K. Sarma, for the Appellant; K.P. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Baharul Islam, J.—This is an appeal under Clause 15 of the Letters Patent from the judgment of a learned Single Judge of this Court and arises out of a probate case.

2. Lakheswar Nath, respondent No. 1 herein, filed an application u/s 270 of the Indian Succession Act (hereinafter called the Act), before the District Judge, Dhubri, for the probate of a will alleged to have been executed by one Purnima Bala Devi, who died on 21-7-69. In the application he mentioned the names of appellants 1, 2 and 3 and respondents 2, 3, 4, 5, 6 and 7 and one Jikafuli Devi as the relatives left by the deceased Purnima Bala Devi. In the application he mentioned that he had been appointed by the testatrix the executor of the will.

3. The appellants filed objections. Their material objections were to the effect that at the relevant time the executrix "had no testamentary and mental capacity, she had no disposing mind, she had no mental power requisite for a valid disposition of property, she was in extreme suffering due to serious illness and extreme old age". It was averred that the will was the result of collusion and fraud perpetrated by the applicant and the legatee, Haranath. It was also stated

in the objection that before the alleged will was executed, another will had been executed by Purnima Bala Devi on 21-10-1959 in favour of the appellants and Jikafuli, aforesaid. It was further averred that Jikafuli had died before the death of Purnima. She had left behind heirs who were not made parties to the application, and, as such, the application was bad in law.

4. Respondent No. 7, Golok Chandra Nath, and one Lalit Chandra Nath also filed an objection, but ultimately they did not contest the application for probate.

5. The learned District Judge framed the following issues:

(1) Whether the alleged Will has been executed by Purnima Bala?

(2) Whether said Will is genuine?

(3) Whether Purnima Bala had testamentary and mental capacity to execute the Will?

(4) Whether the will had been brought into existence by legatee and the applicant?

(5) Whether applicant is entitled to get probate?

6. The applicant examined 4 witnesses and the appellant 4. The learned District Judge first took up for decision issue No. 5 and he, before considering the evidence of the witnesses examined by the applicant (respondent No. 1), considered certain circumstances, to which we shall refer a little later, and came to the finding that the execution of the will was suspicious, and in that view he rejected the application for probate. On appeal the learned Single Judge set aside the judgment of the learned District Judge and ordered grant of probate as prayed for. Thereafter the contesting objectors have filed the present appeal u/s 15 of the Letters Patent as stated above.

7. The first submission of learned counsel for the appellants is that as the Jikafuli's heirs, who had interest in the property involved in the will have not been made parties to the probate proceedings and no notices were issued to them, the proceedings have been vitiated. In support of his contention learned counsel relies on S. 283(1)(c) of the Act, Which is in the following terms:

283. (1) In all cases the District Judge or District Delegate may, if he thinks proper,-

.....

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

Sub-section (2) of Section 283 of the Act may also be read:

(2) The citation shall be fixed up in some conspicuous part of the Court-house,

and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

It is apposite in this connection to refer to Section 373(1) of the Act, which reads as under:

373(1). If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing-

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge subject to any rules made by the High Court in this behalf, thinks fit,

and.....

Section 373 of the Act provides the procedure to be followed by the District Judge on an application for succession certificate. Section 372 provides for an application for a succession certificate. Under clause (c) of sub-section (1) of Section 372 "the family or other near relatives of the deceased and their respective residences" have to be mentioned. On the other hand Section 276 of the Act, which provides for a petition for probate, does not provide for mentioning the names of the members of the family or relatives of the testator or testatrix in the petition for probate. In case of a succession certificate the law provides for issuing both special and general citations, but in case of probate proceedings Section 283 does not provide for issuing special citations. Section 283(1)(c) provides only for issue of general citation calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate. But as there is no provision for special citation under subsection (2) of Section 283, it has been made mandatory that the citations shall be fixed up in some conspicuous part of the court house and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct. As a proposition of law, therefore, it cannot be said that special citations are to be issued to persons having interest in the property involved in the will. In the instant case, however, special citations were issued, albeit not to the heirs of Jikafuli, and also general citations were issued. There has been no violation of law in issuing the citations in the instant case, and, as such the probate proceedings have not been vitiated, as contended by learned counsel. The first submission of learned counsel has no substance.

8. The second submission of learned counsel is that the applicant failed to prove the will to be a valid document; on the contrary, he submits, the facts and circumstances on record show that it is a suspicious document.

9. Section 59 of the Act provides:

Every person of sound mind not being a minor may dispose of his property by will.

Under Explanation 4 "No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing". In other words, the testator or the testatrix must be a major and of sound disposing mind.

Section 63(c) of the Act, inter alia, provides for the execution of an unprivileged will. It, inter alia, provides:

The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will.....

Section 68 of the Evidence Act provides, inter alia-

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive.....

There is no prescribed form for a will (S. 74).

10. Their Lordships of the Supreme Court in the case of H. Venkatachala Iyengar v. B.N. Thimmajamma, on which reliance has been taken by learned counsel for the appellants, reported in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , have observed:

Section 68 deals with the proof of the execution of the document required by law to be attested; and it provide, that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution.....

The propounder would be called upon to show 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 dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words the onus of the propounder can be taken to be discharged on proof of the essential facts just indicated.

Their Lordships have further observed:

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances.....the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the

testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators, but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances above referred to, in some cases the wills propounded disclose another infirmity.....If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.

Their Lordships have further observed:

It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any 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.

11. The law, therefore, is that it is the propounder's burden to prove satisfactorily that the testator or the testatrix had the sound and disposing mind and capacity to execute the will, that if there be any circumstances appearing against the due execution of the will it is for the propounder to remove those doubts from the mind of the Court. Further he is to prove due execution of the will and for that purpose he is to examine at least one of the attesting witnesses, if available.

12. Let us now examine the facts of this case. The alleged suspicious circumstances on account of which the learned District Judge rejected the application for probate are 5 in number. They are - (i) That the will is not in form and in the will the condition of health of the testatrix has been described as (Original omitted) (unable to move). But the witnesses for the propounder have

deposed that the testatrix at the relevant time was hale and hearty; (ii) that although admittedly the testatrix had left behind grand-children through daughters, it has been mentioned in the will that she had no (Original-omitted) (children and grand-children), (iii) that there was no reason to will the property in favour of a brother's son in preference to her natural heirs; (iv) that before the execution of the will in question (Ext. 1) admittedly she had executed another will (Ext. A), but there is no mention of Ext. A in Ext. 1; and (v) Ext. 1 was executed at Goalpara although admittedly there is a sub-registry at Lakhipur, which is nearer to the house of the executrix.

13. The learned Single Judge has examined at length all these circumstances one by one and he has found that these are not at all suspicious circumstances. We do not find any reason to differ from him on the findings in this behalf. The expression "Alar-Achar" has been used in Ext. 1. The P.Ws. have stated that they did not hear the expression "Alar Achar", being told to the scribe (P.W. 1) by the testatrix. The explanation of the scribe P.W. 1 was that he wrote the deed from a sample borrowed from one of his colleagues, who was also a petition writer. It is therefore possible that although indeed the testatrix was not "Alar Achar" the expression "Alar-Achar" was borrowed by the scribe from the sample; or he might have himself used the term seeing the testatrix very old, who, as deposed by D.Ws. 2 and 4, was aged about 80 or 85 years. With regard to the second circumstance, although the dictionary meaning of "Sati Santati" is "Nati Puti", meaning children and grand-children the learned single Judge also has found that "Sati Santati" also means lineal descendants and the testatrix might have used the expression in that meaning. Another possibility is that the expression was used in a loose sense. It may be mentioned that expressions "Alar-Achar" and "Nati-puti" are not essential terms of the will in question. The third circumstance has been well-explained by the witnesses who have deposed that as the testatrix was driven away by the natural heirs, she had gone to the house of Dhananjay where she passed her last days and where ultimately she died; and it was Haranath Nath, son of Dhananjay, who nursed her in her old days, and that the natural heirs did not only not nurse her but even did not come to enquire about her health. With regard to the 4th circumstance it was not incumbent on the part of the testatrix to mention the fact of execution of the earlier will (Ext. A) in Ext. 1. It cannot be said to be concealment and, as such, is not suspicious. With regard to the last circumstance it has been explained by P.W. 3 in cross-examination that although Lakhipur is nearer to the home of the executrix as it takes a long time at Lakhipur to get back a registered document, it was decided to get the will registered at Goalpara.

14. In our opinion the alleged suspicious circumstances have been satisfactorily explained and doubts removed from the mind of the Court.

15. The due execution of the will has been proved by the scribe (P.W. 1) and by two of the three attesting witnesses, namely, by P.Ws. 2 and 3. P.W. 4 is not an attesting witness to Ext.; his evidence is that he was also present when the deed

was executed. He corroborates the evidence of P.Ws. 1, 2 and 3. All the P.Ws. have deposed that the executrix was hale and hearty and of sound and disposing mind. P.W. 1 has deposed that Ext. 1 was written by him at the instance of the executrix and that it was read over to her, she admitted it correct and then she put her thumb impression, which was endorsed by him. On this point also he is corroborated by P.Ws. 2, 3 and 4.

D.Ws. 1, 2 and 3 have proved execution of Ext. A and have further deposed to the effect that the executrix at the relevant time was very old and infirm. According to P.Ws. 2 and 4 she was aged about 80 to 85 years. But they have not proved that the testatrix had no understanding capacity and was unable to know that she executed a will. It cannot be presumed that a person of 80 or 85 years does not have sound mental capacity. A person physically infirm may be mentally and intellectually fit.

16. Agreeing with the learned Single Judge we find that the propounder has satisfactorily proved the due execution of the will by the executrix; and that the alleged suspicious circumstances have been satisfactorily explained and the doubts have been removed from the mind of the Court.

17. It was pleaded by the appellants that the will was the result of fraud and collusion perpetrated by the legatee and the propounder. The burden of proving fraud is upon the person who alleged it. In the instant case the appellants have failed to discharge that burden.

18. In the result this appeal fails and is dismissed. We, however, make no order as to costs.

D. Pathak, J.

19. I agree.