

(1942) 12 CAL CK 0005
In the Calcutta High Court

Mahendra Nath Surul and Another

APPELLANT

Vs

Netai Charan Ghosh and Others

RESPONDENT

Date of Decision : 22-12-1942

Acts Referred:

Evidence Act, 1872 — Section 90
Succession Act, 1925 — Section 63

Citation : AIR 1944 Cal 241

Hon'ble Judges : Rau, J

Bench : Division Bench

Judgement

Rau, J.—This is an appeal from the judgment of the District Judge of Hooghly refusing to grant letters of administration to the appellants with a copy of the will said to have been executed by one Madhab Chandra Mondal. The will purports to have been executed as long ago as 1871 and was registered before the Sub-Registrar of Hooghly on 17th July 1871. The executors named in the will and the attesting witnesses are, as may be expected, all dead. The applicants for the grant are the sons of Jadu Nath Surul, who was a son of the testator's sister and was one of the legatees under the will. The objectors are the sons of Kali Charan Ghosh, who was the son of the testator's daughter and was the residuary legatee. The District Judge has found that the will was not properly attested as required by Section 63, Succession Act, 1925 and has therefore refused the grant. Hence this appeal by the proponents of the will.

2. The only issue argued before us is whether there was proper attestation. Undoubtedly, Section 63 of the Act requires that an attesting witness to a will must sign the will in the presence of the testator and the context makes it clear that the mere affixing of a mark will not suffice for attestation. Such was also the law when the will in question was made (1871). The District Judge finds that in this case all the attesting witnesses were illiterate and merely affixed their marks, so that the attestation was on the face of it invalid.

3. We have examined the original will carefully and have come to the conclusion

that there is no satisfactory basis for this finding. There are no fewer than six attesting witnesses; there is no direct evidence that any of them were illiterate and it would be rather strange if the testator, who had sufficient circumspection to register the will, selected for his attesting witnesses six persons all of whom were illiterate and unable to sign their own names. The will itself was written by one Behari Ghoshal who died about 30 years ago (see the evidence of p. W. 2); but it does not follow that he wrote the names of the witnesses also. Indeed, the formation of the Sri prefixed to the names of the first two witnesses is so different from that of the Sri prefixed to the names of the last four that they could not all have been written by the same man. Again, in at least four of the six names it is not possible to say whether the apparent "mark" is really a "mark" or merely a flourish at the end of the signature; certainly in the case of the first name, the same person that signed it also made what looks like a cross at the end without lifting the pen. It is also not without significance that in no case is there any such word as bakalam to indicate that the signature of the witness was by the pen of somebody else. In these circumstances, it may properly be said that the signatures purport to be in the handwriting of the witnesses themselves.

4. This being the state of the evidence, the question arises whether Section 90, Evidence Act, does or does not apply to the case. The will was undoubtedly made more than 30 years again fact more than 70 years ago and it has been produced from the proper custody. There is nothing in the terms of the section to limit its application to non-testamentary documents; but our attention has been called to the decision in *Shyam Lal v. Rarneswari* A.I.R 1916 WB. 938 . where this Court observed that the Rule laid down in the section did not apply to proof of a will in the Probate Court. The learded Judges went on, however, to point out that in any event the rule was merely discretionary, since the section says "the Court may presume" and that in that particular case there were other circumstances to show that the will was not genuine. Evidently therefore the observation that the Rule did not apply (even as a matter of discretion) to proof of wills was obiter, and it appears to have been treated as such in a subsequent case in this Court, *Gobinda Chandra Pal and Others Vs. Pulin Behari Bannerjee and Others*, , where it was held that the section does apply to wills as much as to other documents. The only ground given for the observation to the contrary in the earlier decision is that if the section were applicable to wills, it would become unnecessary to prove wills executed more than 30 years before the testator's death, even where some of the subscribing witnesses might be alive. This does not necessarily follow; the presumption mentioned in Section 90 is not obligatory: the Court may or may not make it according to the circumstances of the case. Where some of the attesting witnesses are alive and the proponent of the will omits to examine them, the Court may prefer to make the presumption mentioned in Section 114, illus (g) rather than the one in Section 90. The proponent may also be hit by the provisions of Section 68.

5. For these reasons we have no hesitation in holding, as was held in *Gobinda*

Chandra Pal and Others Vs. Pulin Behari Bannerjee and Others, . that Section 90 according to its plain terms applies to wills as to other documents. There are no suspicious circumstances in the present case; on the contrary the fact that the will was duly registered after it had been executed removes any ground for suspicion. We are therefore prepared to make the presumption permitted by the section and to hold that the signatures of at least four of the attesting witnesses were in their own handwriting and that the will was duly executed and attested. Having regard to the definition of the words "may presume" in Section 4 we think it clear that where the Court chooses to make the presumption authorized by Section 90, no further proof of the facts is necessary u/s 69. We regard them as proved.

6. We accordingly allow the appeal and direct that the appellants be granted letters of administration with a copy of the will annexed. As to costs, we notice that the father of the appellants although one of the attesting witnesses and therefore necessarily aware of the existence of the will, omitted to apply for letters of administration. If he had applied the present contest might not have arisen. We therefore direct that each party bear its own costs in this Court as well as in the Court below.