

(1980) 07 CAL CK 0039
In the Calcutta High Court
Case No : Testamentary Suit No. 7 of 1979

Nandadulal Dey and Others	Vs	APPELLANT
Smt. Mira Das and Another		RESPONDENT

Date of Decision : 18-07-1980

Acts Referred:

Succession Act, 1925 — Section 63

Citation : AIR 1981 Cal 83

Hon'ble Judges : A.K. Sarkar, J

Bench : Single Bench

Advocate : Ruma Pal, for the Appellant;

Judgement

A.K. Sarkar, J.—The suit is a contentious cause. A caveat was entered on behalf of one Sm. Mira Das to the application for probate of the Will of one Bhupendra Nath Chandra dated 5th November, 1967 by the three executors named in the will. The testator, Bhupendra Nath Chandra died after about 10 years on 6th October, 1977.

2. The facts are that, the deceased Bhupendra Nath Chandra left properties both moveable and Immovable within and outside the jurisdiction of this Court and died surviving him the widow, three sons and five daughters. All the daughters were married to well-to-do persons, the particulars are set out in paragraph 5 of the petition. A copy of the Will has been annexed to the said petition and marked with the letter "A". A caveat was entered to the said application for grant of probate by Sm. Mira Das, the youngest daughter of Bhupendra Nath Chandra. Sm. Latika Nag, the eldest daughter of the testator supported the caveat she filed affidavit in support thereof jointly with the caveatrix affirmed on 21st June, 1978.

3. The following Issues were raised and settled in Court:--

ISSUES:

1. Did the testator have mental capacity at the time of execution of such Will ?
2. Was the alleged Will made by the testator out of his free will ?
3. Was the alleged will signed by the testator ?
4. Are the plaintiffs entitled to grant of probate of the will of Bhupendra Nath Chandra, deceased?
4. Mrs. Ruma Paul appeared for the Pro-pounders, the three executors named in the Will, Mr. A. C. Kar appeared for the caveatrix, Sm. Mira Das.
5. Bhupendra Nath Chandra was a retired Headmaster of a High School at Jabalpur, Madhya Pradesh. He came down to Calcutta sometime in or about 1960 and resided in Kinderdine Lane. In 1966 he purchased a house at No. 49A, Tollygunge Circular Road and resided there.
6. On 5th November, 1967, the testator called his two sons-in-law, e. g. Nandadulal Dey and Subodh Chandra Mallick and his eldest brother's son, Sailendra Nath Chandra at his residence at No. 49A, Tollygunge Circular Road, Calcutta and produced a typed out Will and stating that it was his last Will executed the same in their presence. He asked the said three persons who were the only persons present there to sign the said Will as attesting witnesses in his presence The said attesting witnesses accordingly signed the Will in each other's presence and in the presence of Bhupendra Nath Chandra. By the said Will the testator appointed the said three attesting witnesses, the executors. It is in evidence that the testator himself had typed out the Will in his one typewriter machine and executed the said Will in the presence of the said three attesting witnesses who also signed the said Will in the presence of each other and in the presence of the testator. The testator after execution gave a copy of the said Will to each of the said three attesting witnesses for their custody. The witness, Nandadulal Dey produced the copy given to him which was tendered as Ext. B and the signature portions encircled in red pencil was marked Exhibit B-I. The original Will itself dated 5th November, 1967 was proved and tendered as Exhibit A. The testator died on 6th October, 1977, i.e. about 10 years thereafter. He was in perfect health and in sound mind at the date of execution. The testator attended his relations and did domestic works and used to do all works and was absolutely in perfect mind. The witness, Nandadulal Dey in answer to a suggestion put to him denied and stated to be incorrect that the testator did not know what he was doing when he signed the Will and in answer to Q 26, Q 41, Q 42 and Q 51 stated that the testator was normal and nothing disturbed his mind to do anything as he liked.
7. The testator fell down and broke his bone in one of his legs and was bed ridden for more than six months. During that period he gave power of attorney to his eldest son, Abanindra Nath Chandra to collect rents from his tenants by signing receipts in acknowledgment thereof. He further stated that the testator was not at all perturbed in mind because of the death of the husband of his

eldest daughter, Latika Nag who died about one year before the execution of the Will. It is further in evidence that the testator normally attended all the jobs even for maintaining the properties. He sometimes asked his eldest son to attend and do the works.

8. From the evidence of Sri Nandadulal Dey, a practising Solicitor of this Court since 1941, I am of the view that the said Will has been solemnly proved.

9. The signature of the testator was also proved by the evidence of Kinnor Kumar Chatterjee, an Officer of the Mercantile Bank Ltd., who upon subpoena produced the specimen signature of the testator, Bhupendra Nath Chandra maintained by the Bank.

10. Sukanta Mallick, a grand son of the testator, stayed with the testator at his residence at No. 49 A, Tollygunge Circular Road in the years 1967, 1968 and some part of 1969 when he was studying in New Alipore Multipurposes School. He stated in evidence that the testator was his guardian, tutor and everything. To show that the testator, his grand father was his guardian, he produced his School diary. Regulation Book, mark-sheets which were confirmed by the testator and stated that the mental condition of the testator in November, 1967 was all right and that the witness clearly remembers the same. The testator further tutored the witness for 21/2 years and was mentally quite good enough to guide him. He proved the signature of the testator at page 6 of the report of the New Alipore School and at page 14 of the said report encircled with the red pencil and tendered and marked as Exhibits D, D-1 and D-2. The witness also proved all the signatures in the will, Exhibit A and also in the copy of will, Exhibit B. In answer to Q 38 and Q 39 he denied the suggestion that the testator was not in a mental state to execute the Will and stated that he was fully capable of executing the Will. In answer to Q 40 to Q 43 the witness proved the signature of the testator, his grand father in the copy of the Will, Exhibit B.

11. From the evidence of Sm. Mira Das, the caveatrix, it appears that she admitted her father, the testator died on 6th October, 1977. In answer to Q 16 she admitted that the testator was in the habit of writing by typewriter and had a typewriter of his own and in answer to Q 18 she admitted that he used his typewriter mostly. The witness admitted that when the Will was executed, she was not here and between 1964 and 1968 she was in United States. The relationship of the testator with his daughters was cordial. Her father left two house properties; one in No. 5 Madhu Gupta Lane which is rented and another at No. 49A, Tollygunge Circular Road where he resided. Mr. Nandadulal Dey used to look after the properties when her father lived in Jabalpur. She also admitted that her father actually was bed-ridden with fractured leg, but could not exactly remember the date. And in answer to Q 83 she stated that her father was suffering from Sciatica, neurological pain and often could not recognise them. She does not consider that the fractured leg of her father was the immediate cause of his death. In answer to Q 126 she admitted that her father, the testator had an account with the Mercantile Bank Ltd. and in answer to Q 139 she

admitted that as Headmaster her father was a man of strong personality.

12. Her suspicion was merely that, the signature as Bhupendra Nath Chandra in the Will was not the signature of her father, but no case of forgery was made by her. She failed to give any reason for that and stated that her eldest brother who used to copy her father's signature used to copy and sign both short signature and long signature. But in answer to Q 170 when she was asked that if her eldest brother wished to forge her father's signature, he could sign his father's signature as he had always signed, to that she could not give any answer. In answer to Q 182 in cross examination she admitted that the case with which she has come to Court is that Mr. Nandadulul Dey forced her father, unduly influenced him to sign the document. But when the case was put to her, in answer to Q 183 she replied that she simply meant that the Will was made and drafted by Nandadulal Dey and nothing else and when she was further asked that she was giving up the case that her father was forced to sign the document by Mr. Nandadulal Dey or unduly influenced by him to sign the document, she replied in answer to Q 185 that she does not think that her father signed the Will at all and in answer to Q. 186 she agreed that if Mr. Bhupendra Natb Chandra has not signed the document, the question of his being forced or unduly influenced never arose and in answer to Q 188 she admitted that she could not say that Mr. Nandadulal forced her father to sign the Will.

13. Her evidence further is that the signature in the Will was not her father's because of his mental incapability he could not have made the Will. Therefore, her evidence in answers to Q 182 to Q 193 put to her in cross examination is absolutely incoherent and cannot be accepted by me.

14. Therefore the Issue No. 1 is answered "Yes". Issues Nos. 2 and 3 are answered in the affirmative. The plaintiffs in answer to Issue No. 4, are entitled to grant of Probate of the Will of Bhupendra Nath Chandra, deceased. His widow and the sons all consented to the grant of Probate to the applicants and in proof thereof signed at the bottom of the application.

15. Mr. A. C. Kar appearing for the caveatrix very frankly admitted in his argument that his client, the caveatrix has not come to Court with the case of forgery but only with a complaint that the signature in Exhibit "A" was not the signature of her father, Bhupendra Nath Chandra.

16. The case of undue influence and forgery are rather self-destructive. If a case of undue influence is made, it cannot be forgery and vice versa. 20 CWN 310: (AIR 1916 Cal 658). The conditions required u/s 63 of the Indian Succession Act have been fully fulfilled for the grant of a probate. Therefore, the Probate of the last Will and testament of Bhupendra Nath Chandra dated 5th November, 1967 is granted to the petitioners, the executors appointed and named in the said Will with effect throughout the State of West Bengal. The costs of an incidental to the application for obtaining the Probate will come out of the estate of the deceased.