
(2005) 05 GAU CK 0024
In the Gauhati High Court
Case No : M.A. (F) 10 of 1999

Pradip Saikia and Others

APPELLANT

Vs

Suwala Saikia and Others

RESPONDENT

Date of Decision : 13-05-2005

Acts Referred:

Succession Act, 1925 — Section 376

Citation : AIR 2006 Guw 56 : (2005) 3 GLR 297

Hon'ble Judges : Aftab H. Saikia, J

Bench : Single Bench

Advocate : A.K. Goswami and Senapati, for the Appellant; None appeared, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Saikia, J.—Heard Ms. S. Senapati, learned counsel for the appellants. This appeal has been preferred against the judgment and order dated 23.12.1998 passed by the learned District Judge, Sibasagar in Misc. (P) Case No. 40/90 wherein the prayer for grant of probate of a will sought by the appellants was rejected.

2. The facts in brief as gathered from a conjoint reading of the pleadings exchanged by and between the parties may be noticed. Appellants are the nephews of one Late Pakaram Saikia who was the father of the respondents. Late Pakaram Saikia died on 6.1.1990. According to the appellants, the said Saikia on 28.11.1989, before his death, executed his last Will (Ext.1) in respect of his entire movable and immovable properties of which there was a land measuring about 29 Bighas, 4 Kathas, 6 Lochas in favour of the appellants. After the death of late Saikia, the appellants moved the learned District judge, Sibasagar by filing an application u/s 376 of the Indian Succession Act, 1925 (for short "the Act") through Misc. (P) Case No. 40/90 for grant of probate of the Will dated 28.11.1989.

3. Objecting grant of any such probate, the respondents, all being four daughters of the testator late Saikia, filed a joint written objection pleading inter alia that their deceased father did not execute any valid last Will and the purported Will of the deceased father was obtained by the appellants fraudulently with the sole intention to deprive his legal heirs, i.e., the respondents of their rights on inheritance over the properties of their deceased father as the testator had no son. At the time of alleged execution of the Will, the testator was aged about 90 years who lost eye sight and became mentally unstable. On the other hand, during his life time, he himself managed the properties with the help of his daughters. After marriage, though they lived separately away from their father, they were visiting their father who maintained fatherly love and affection with his daughters. Even on several occasions, he expressed his desire to donate his properties to his daughters. The appellants taking advantage of his old age and ill health, got the Will executed in their names mala fide and with ulterior motive for making wrongful gain and causing wrongful loss to the respondents.

4. The learned District Judge on consideration of the pleadings of both the parties framed as many as three issues which are as follows:

(1) Whether the alleged Will is validly executed or not?

(2) Whether the alleged Will is fraudulently obtained? and

(3) Whether the petitioners are entitled to the Probate, as prayed for?

5. In order to support their respective case, the appellants examined as many as five witnesses when respondents examined as many as six witnesses. Both the parties also exhibited the relevant documents including the Will as Exhbt. 1.

6. On perusal of the entire evidence on record including the relevant documents and also upon hearing the arguments on behalf of both sides, the learned District Judge, Sibasagar decided all those issues, as mentioned above against the appellants holding that there was reasonable and bona fide doubt created as to the mental faculty of the testator who was of 90 years of age. Regarding execution of the Will and making of the Will by late Pakaram Saikia, it was held that it was not the outcome of his love and affection and only to deprive all the four daughters/Respondents of the testator of inheriting their ancestral property, the will was manufactured and consequently the petition for grant of probate of the Will was rejected.

7. Assailing the impugned judgment and order, Ms. Senapati, learned counsel has forcefully argued that the Will in question was voluntarily executed by the testator late Pakaram Saikia who bequeathed his entire properties to the appellants out of genuine love and affection and the finding of the learned Court below to the extent that the appellants being placed in formidable and favourable situation than the respondents, influenced the testator and prevailing upon him to make the Will, was absolutely perverse and not based upon appreciation of the evidence on record. It is further contended that in Exhbt. 2, being the

statements of the testator himself made in a judicial proceeding, i.e., C.R. Case No. 224/89, he himself categorically stated that his daughters/respondents were unconcerned about his well being and that his grand sons took care of him and provided all medical aid whenever he was sick and the learned Judge failed to appreciate such statements as a cogent piece of evidence which threw light on the state of mind of the testator who was completely in a fit state of mind and at the capacity to understand everything at the time of execution of the Will. Ms. Senapati has further submitted that the learned Judge totally over looked the un-rebutted evidence of DW-2, Tileswar Bora who deposed that although the testator had been suffering from various respiratory problems including asthma, he was mentally sound and physically well so far as cognitive faculty of the testator was concerned, while deciding the crucial issue of the testator's capacity at the time of making of the Will and absence of appreciation of such vital evidence has resulted in miscarriage of justice. According to her, on the grounds above mentioned so advanced by her the impugned judgment and order is liable to be set aside and quashed.

8. I have carefully gone through the deposition of the witnesses adduced by both the appellants as well as respondents and also have meticulously examined the impugned judgment and order. It appears that the learned Judge considered all the three issues so framed by him being inter-related by taking up together and decided against the appellants.

9. P.Ws. 1 and 2, i.e., Prafulla Saikia and Phatik Ch. Dutta were the attesting witnesses of the Will and P.Ws. 5, Kalia Saikia was a chance witness who witnessed the making of the Will by the testator in the office of the petition writer of Sibasagar Court. From the evidence of Prafulla Saikia, P.W. 1, it appears that he was all along present starting from the time of carrying the testator from his house to the Court and also till execution of the Will by the testator but surprisingly in his cross he stated that he did not know what was written in the Will. In chief he testified that he himself and another witness P.W. 2, Phatik Ch. Dutta the another attesting witness signed the Will after the signature of the testator . However, in cross he deposed that they put their signature after Pakaram, the testator, put his signature.

10. So far evidence of Phatik Ch. Dutta, P.W. 2 is concerned, according to this witness, on request of the sister of Pradip he accompanied Pradip, Prafulla and the testator Pakaram to Sibasagar Court in a vehicle and when a maharar of Sibasagar Bar was writing a Will for the testator, he along with others were gossiping as a little away from the place where the Will was written. When the Will was read out to the Pakaram, the testator put his signature and thereafter they put their signatures. Another witness Jagneswar Baruah, P.W 3 the Will writer also deposed that though he did not remember the person who accompanied Pakaram, those persons only brought and arranged all necessary papers etc. to facilitate the writing of the Will.

11. On the other hand, Kalia Saikia, P.W. 5 testified that Prafulla Saikia, Phatik

Ch. Dutta, Jay Ch. Bharali and Pradip all of them accompanied Pakaram to execute the Will and he came to the office of the petition writer on being asked by them. He categorically deposed that Pradip Saikia brought Pakaram to the court by a vehicle and it were Pradip, Phatik, Prafulla and Joy Chandra who discussed with the petition-writer about writing of the will.

12. The depositions of those witnesses appear to be contradictory and not satisfactory. It is noticeable that though Prafulla Saikia who, being the attesting witness, was all along with the testator and during the entire period of execution of the Will, he did not know the contents of the Will. There was no whisper in the evidence that the Will was written at the behest of the testator. The Will was executed on 28.11.1989 and testator died on 6.1.1990. Onus lies on the propounders to prove that the testator executed the Will when he was in good health with proper mental and physical condition. But from the evidence on record, there was no such document to reinforce the fact that the testator was in such a good physical and mental condition. On appreciation of the evidence of the witnesses adduced by the respondents it appears that Pakaram, the testator, was not in good health and an ailing old man having lacked of mental acumen. It has come on the evidence of D.W. 1, Brojen Saikia that after marriage of his youngest daughter the testator started speaking incoherently and there was loss of memory and his mental condition was not sound which also supported the deposition of Kalia Saikia, P.W. 5 who stated that testator was an asthmatic patient and such statement of Brojen Saikia, D.W. 1 was also been corroborated by other witnesses.

13. Dr. Suren Gogoi, D.W. 4 who was a Senior Medical and Health Officer-in-charge of Barbari Primary Health Centre, deposed that on 20.10.1989 he issued one medical certificate being Exhbt. "Ka" to Pakaram Saikia, the testator, who was then more than 80 years of age opining that he was suffering from chronic asthmatic bronchitis with mature cataract of both the eyes and was advised to attend Psychiatry Department as he was having mental problems due to his old age. So according to the doctor's opinion, the testator could not be said to be stable man because of his physical and mental state of health and he was not concerned about his acts and omissions. This certificate was challenged by the appellants being a got up document. But there was nothing on record to disagree with the said medical certificate.

14. On consideration of these evidence, and upon hearing Ms. Senapati, the learned counsel for the appellants, this Court has no hesitation to hold that the testator was not in a good and proper health condition so as to make himself fit for execution of the Will and that the suspicious circumstances that arose in the execution of the Will itself was not removed adequately by the propounder.

15. Law governing the proof of a Will is well established. The burden of proof of a Will is always on the propounder and in absence of suspicious circumstances surrounding the execution of a Will, the proof of testamentary capacity and the signature of the testator as required under law would be sufficient to discharge

such burden. However, where any suspicious circumstances occurs, onus is on the propounder to explain to the satisfaction of the Court that Will is genuine. A Will is an instrument that contains the last desire of the testator/testatrix. Normally, the Court, therefore, acts in accordance with the wishes of the maker of the Will. However, if, any way, the Court is to doubt either the voluntariness or genuineness as regards the execution of the Will, it would disassociate to act in accordance with what has been narrated in the Will. If the Will is surrounded by suspicious circumstances, the removal of such suspicion shall be always the onus of the propounder. Until and unless such suspicion is removed, the Will shall not be probated.

16. Suspicious circumstances may be as to the voluntariness in execution of the Will of the testator, lack of genuineness in the dispositions in the Will being unnatural, improbable or unfair in the light of relevant circumstances and/or there might be other relevant materials to show that testator's mind was not free. If the propounder succeeds in removing any such suspicious circumstances from the mind of the Court, definitely the Court would grant probate. In the instant case, though burden was on the propounder to remove such suspicious circumstances, they failed to do so. It is a case where an attempt was made to debar the natural heirs of the testator from getting their due share of the properties on the normal line of succession.

17. In view of what has been stated and discussed above, this Court is of the considered view that there is illegality or irregularity in the findings of the learned District Judge calling for interference of this Court. Consequently, this court is in full agreement with the views expressed by the learned District Judge in rejecting the prayer for grant of probate.

18. In the result, this appeal stands dismissed. No costs.