

(2001) 08 GAU CK 0026
In the Gauhati High Court
Case No : M.A. (F) No. 34 of 1996

Radhesyam Mandal

APPELLANT

Vs

Ramdulal Mandal

RESPONDENT

Date of Decision : 21-08-2001

Acts Referred:

Succession Act, 1925 — Section 299, 63

Citation : (2001) 2 GLT 467

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : K.P. Singh, for the Appellant; T.C. Khetri, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—This appeal is directed against the judgment and order dated 22.9.1995 passed by the learned District Judge, Sonitpur at Tezpur in Title Suit No. 20 of 1992 u/s 299 of the Indian Succession Act, 1925. By the impugned order the learned District Judge dismissed the objection raised by the Appellant and granted probate of the Will executed by Late Mangal Chandra Mandal during his life time in favour of the Respondent.

2. I have heard Mr K.P. Singh, learned Counsel for the Appellant and also Mr T.C. Khetri, learned Counsel for the Respondent.

3. Late Mangal Chandra Mandal during his life time, executed a Will on 9.3.88 in favour of the Respondent Shri Ram Dulal Mandal in respect of an estate comprising of a plot of land measuring 1 Bigha 2 Kathas 10 Lechas covered by Dag No. 389 appertaining to Periodic Patta No. 38 of Village: Dighalibasti. The application for grant of probate in Miscellaneous Case No. 90/1990 became contentious in view of the objection raised and, therefore, it was converted into Title Suit No. 2/1992.

4. The issues framed by the learned District Judge centre around the question of genuineness of the Will and its execution.

5. Shri K.P. Singh, learned Counsel for the Appellant submitted that the Will cannot be allowed to be probated as it has been executed under suspicious circumstances. Mr Singh, learned Counsel further submitted that the left thumb impression of the testator has not been attested by any witness and, moreover, the attesting witnesses are from a different place and they do not know the executor. Besides, Shri Singh pointed out that the testator died under suspicious circumstance and that is why his dead body was buried and not cremated according to Hindu rituals. Shri Singh also relied upon the decision reported in 1993 1 GLR 152 in support of his contention.

6. It would appear from the pleadings and evidences on record that the deceased testator Late Mangal Chandra Mandal was the owner of the properties described in the Will which is the last Will and testament. Mangal Chandra Mandal died without leaving any heir to succeed him. His wife also pre-deceased him. The Petitioner is the cousin of Late Mangal Chandra Mandal who had given shelter to Mangal Chandra Mandal when he was ill. Mangal Chandra Mandal who had no near relation was living in the house of Ram Hari and the Petitioner-Plaintiff brought Mangal Chandra Mandal to his house to look after him. About one and half month before death, Mangal Chandra Mandal expressed his desire to bequeath his properties in favour of the Petitioner-Plaintiff and wanted to execute a Will. Villagers were called and in presence of Dhananjay Kurmi, Sahan Kurmi and many Ors. declared his intention to make the Will. After about 15 days therefrom Mangal Chandra Mandal came to Court along with the Petitioner-Plaintiff and Sahan Kurmi and got a Will written by Ganesh Talukdar, a scribe of Tezpur Court in presence of witnesses.

7. It would appear from Exhibit-1 that it contains the left thumb impression of the executor and the signature of Shri Kumud Das and Smt Khiroda Mahanta as witnesses. Shri Ganesh Ch. Talukdar put his signature as scribe. The left thumb impression of the testator have been endorsed by Shri Ganesh Ch. Talukdar. But the question remains as to whether Mangal Chandra Mandal infact came to Tezpur Court to execute the Will and whether the left thumb impression are that of Mangal Chandra Mandal.

8. P.W.-1, Shri Ram Dulal Mandal, the Petitioner-Respondent in his deposition stated that Mangal Chandra Mandal came to Tezpur Court along with him and Sahan Kurmi and the Will was executed in his favour. But Shri Sahan Kurmi does not figure in the Will as the attesting witness. P.W.-2, Shri Dhananjay Kurmi is the Sarkari Gaonburah. He is not a witness to the Will. That apart, he did not say that he came to Tezpur Court along with Mangal Chandra Mandal for execution of the Will. P.W.-3, Shri Sahan Kurmi, a signatory to the Will claimed that he came to Tezpur Court where Mangal Chandra Mandal got the Will written by Ganesh Chandra Talukdar. He also claimed to have put his signature as identifier. According to him, he identified Mangal Chandra Mandal before the Sub-Registrar at the time of registration of the Will. Nowhere this witness claimed that he had introduced Mangal Chandra Mandal to the Deed Writer (P.W.-4) or to any of the

attesting witnesses (P.W.-5 and 6).

9. The two attesting witnesses, namely, Shri Kumud Chandra Das and Smti Khiroda Mahanta have been examined as P.W.-5 and 6. Both of them are pleader's clerks working at Tezpur Court at the relevant time. They are not from the village of the parties concerned. In their cross-examination Kumud Chandra Das stated that he did not know Mangal Chandra Mandal personally. Similarly, Smti. Khiroda Mahanta, P.W.-6 also stated that she did not know Mangal before execution of the Will. It, therefore, appears that the attesting witnesses did not know the testator from before. They came in contact with him only on the day of execution of the Will. There is no evidence to show that the testator was identified by any reliable witness before the attesting witnesses. The scribe, Shri Ganesh Chandra Talukdar, examined as PW-4 wrote the Will on request of Smti Khiroda Mahanta, P.W.-6. This witness did not say that Mangal Chandra Mandal was known to her from before. The evidence of P.W.-4, 5 and 6 clearly indicate that they were approached by some persons not known to them from before and on their request the Will was written and executed.

10. The evidence above clearly shows that the testator was not identified by any reliable person either before the Deed Writer or before the Sub-Registrar. Clause (c) of Section 63 of the Indian Succession Act, 1925 requires a Will to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator. Attestation by two or more witnesses must be by those who know the testator. Strangers not acquainted with the testator cannot be attesting witnesses. In the instant case P.W.-5 Kumud Chandra Das and P.W.-6 Smti Khiroda Mahanta, the two attesting witnesses made clear statements in their cross-examination that they did not know the testator Mangal Chandra Mandal personally. They also did not say that Mangal Chandra Mandal was introduced to them by any other person known to them from before. In view of this, I am unable to agree that the Will has been proved to have been duly executed.

11. Besides other circumstances that the dead body was buried in total disregard to the personal law of the deceased and that there was a criminal case for causing death of the testator in which Petitioner-Respondent was arrested lend support to the case of the Appellant that the Will was executed under suspicious circumstances and the LTI hereon are not that of the testator. Burden is on the propounder of the Will to prove to the satisfaction of the Court that the Will was duly executed by the testator in accordance with the provisions of law. In my considered opinion, the requirements of law have not been discharged in the instant case. This conclusion is inevitable when we take the ration available in *Bimalendu Das v. Manjushree Chakraborty* (1993) (1) GLR 152 and *Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others*, into consideration.

12. In the result, the appeal is allowed and the impugned judgment and order

dated 22.9.1995 passed by the learned District Judge, Sonitpur at Tezpur in Title Suit No. 20 of 1992 is hereby set aside. The parties are directed to bear their respective costs.