

(2018) 01 GAU CK 0016
In the Gauhati High Court
Case No : 2 of 2008

SARAT CHANDRA MANDAL

APPELLANT

Vs

SACHINDRA MANDAL

RESPONDENT

Date of Decision : 17-01-2018

Acts Referred:

Succession Act, 1925, Section 59, Section 63, Section 276, Section 384 - Person capable of making wills - Execution of unprivileged wills - Petition for

Citation : (2018) 01 GAU CK 0016

Hon'ble Judges : Kalyan Rai Surana

Bench : Single Bench

Advocate : KK MAHANTA, R. DUARAH, K. KONWAR, A. BARMAN, AK SINHA, A BARMAN, B. CHAKRABORTY, U DAS

Final Decision : Dismissed

Judgement

1. Heard Mr. K.K. Mahanta, the learned Senior Counsel, assisted by Mr. A.K. Sinha, the learned Counsel for the appellant as well as Mr. Biplav

Chakraborty, the learned Counsel for the respondent.

2. This appeal was originally filed under Section 384 of the Succession Act, 1925. The challenge in this appeal is the judgment and order dated

01.10.2007 passed by the learned Additional District Judge, Nagaon in T.S.(P) No. 49/2002.

3. The appellant had filed a petition before the learned Court below for grant of probate of the Will executed on 19.10.2001 by one Jugindra

Chandra Mandal, the uncle of the appellant, bequeathing him the land measuring 4 Bigha under Dag Nos. 25, 179, 206, 209 of P.P. No. 54

(Old)/6 (New) of Uttar Beluguri Kissam, which is described in Schedule-B of the

petition for probate, which formed a part of land measuring 21

bigha 3 katha 13 lechas, which fell into the share of the testator on inheritance from his father, Late Iswar Chandra Mandal.

4. Late Iswar Chandra Mandal had died, leaving behind 3 sons, namely, Upendra Chandra Mandal, Jugindra Chandra Mandal and Sachindra

Chandra Mandal. The appellant is the son of Upendra Chandra Mandal. In the petition, it was projected that Jugindra Chandra Mandal, who was

a bachelor, was living with the appellant for last 18/19 years prior to his death on 31.10.2001 and was looked after and was taken care of by the

appellant.

5. The said petition for probate was contested by the present respondent and the case proceeded ex parte against other 5 (five) Opp. Parties. It

was contended that by words or writing, the testator never intended to bequeath his property to the appellant by depriving his other legal heirs. The

Will was not executed by the testator and it was void and unenforceable. The testator had no power to dispose of the property mentioned in the

Will as the land described in the boundary of the alleged Will did not belong to the testator and he never possessed the same and the said property

fell in the share of the respondent, who had possession over the said land in his own right. The testator was neither mentally nor physically balanced

to understand anything at the time of executing the alleged Will. The Will was manufactured because the appellant knew that when the respondent

was alive, he would not inherit any property of the testator. The Will was created in collusion with the witnesses and other concerned. It was stated

that after the death of the testator, the land was mutated in his name in respect of his share.

6. On the basis of pleadings, the following issues were framed for trial:-

i. Is there any cause of action for the suit?

ii. Whether the suit is maintainable in the present form?

iii. Whether the Will in question executed by Jugindra Ch. Mandal is genuine one and his last Will?

iv. Whether the plaintiff is entitled to get probate in respect of the Will as alleged?

7. In support of his case, the appellant- plaintiff had examined 4 (four) witnesses, viz., himself (PW-1), Narayan Chandra Sarma (PW-2), Niranjana

Mallik (PW-3) and Nikhil Chandra Sarkar (PW-4). The Will registered before the Sub-Registry was exhibited by PW-2 as Ext.1, Ext.1(1) and

1(2) were the signatures of PW-2 and Ext.1(4) was his signature as the writer. Ext.1(3) was the signature of witness Kalipada Ghosh. The death

certificate was marked as Ext.2. The respondent examined two witnesses, viz., himself (DW-1) and Krishna Kanta Karmakar (DW-2) and

exhibited jamabandi of the suit land as Ext. Ka.

8. In respect of issues No.1 & 2, it was held that the application for grant of probate should have been under Section 276 of the Succession Act,

1925 and that the plaintiff had wrongly quoted Section 376 in his petition and that for the wrong quoting of the provision of law, the petition was

not liable to be rejected. Hence, the petition was held to be maintainable under Section 276 of the Succession Act, 1925 and the said issues were

decided in favour of the plaintiff.

9. The issue No.3 was taken up thereafter. The said issue was discussed under four separate sub-headings. Discussing the evidence of the parties,

it was recorded that as per the version of PW-1, the petition writer, namely, Narayan Chandra Sarma, had written the Will and that he had started

writing the Will at 11.00 a.m. and it took him half an hour to write the Will. Thereafter, the PW-1 along with Nikhil Chandra Sarkar went to the

Sub- Register Office for registering the Will, where the testator told the Sub-Registrar that he had given the land to the executor-propounder. As

per the evidence of PW-2, Narayan Chandra Sarma (Deed Writer), he had written the Will as per version of the testator, which was read out to

the testator, who put his thumb impression [Ext.1 (1) and Ext.1(2)] and that the attesting witnesses, namely, Niranjan Mallik and Kalipada Ghosh

had put their signatures on Ext.1 [i.e. Ext.1(5) and Ext.1(3) respectively] after it was signed by the testator. PW-2 had stated that all of them had

signed in the Will. The PW-2 had stated that he knew Kalipada Ghosh and his signature [Ext.1(3)], who had since died. His own signature was

marked as Ext.1(4). He had further deposed that the testator was in good health on that day. The learned trial court held that the description of the

family members of the testator was wrongly described by PW-2, as such, he did not know the testator. The testator was identified by Nikhil

Chandra Sarkar, as such, the learned trial court held that on the day of writing

the Will, PW-2 had no clear idea who was actual testator. As per PW-2, he had written the Will at 1:30/ 2:00 PM and he took one hour time to write the Will, as such, on the time of writing of the Will, contradiction was found in the evidence of PW-1 and PW-2. Hence, according to the learned trial court, there was suspicious circumstance in the execution of the Will. It was held that at the time of death, testator had left behind no Class-I heir but he left Class-II heir, namely, his brother Sachindra Mandal and as per Section 8 of the Hindu Succession Act, the land left behind by the testator would devolve on the said Class-II heir.

Hence, by executing the Will, the said Class-II heir was deprived, which according to the learned trial court was a circumstance which was required to be noted seriously. It was further held that the propounder had actively participated in the execution of the Will because he had brought the testator to the Sub-Register office, purchased Stamp papers and gave it to the scribe and gave patta and dag no. to the scribe and directed the scribe to write a Will. The learned trial court had disbelieved the evidence of PW.2 in his evidence- on- affidavit where he stated that he had written the Will as per the direction of the PW-1.

10. It was held that the propounder did not lead any evidence to prove his plea that he had nursed the testator in his old age or that the testator had died while staying with the propounder, as such, those facts were held to be not proved and as such, it was held that the propounder failed to remove suspicion of the genuineness of the said Will. Moreover, taking note of the fact that the Will was executed on 19.10.2001 and that the testator had died on 31.10.2001, the learned trial court had considered the statement made by PW-1 in his cross examination that the testator had suffered from asthma and dysentery and died as a result of such illness, as such, it was held that at the time of execution of the Will, the testator was not in sound health and it was held that it was the duty of the plaintiff to prove the sound health and mind of the testator by adducing additional witness. By referring to the case of Lamodhar Bordoloi Vs. Narendra Nath Bordoloi and others, 1999 (1) GLT 247, it was held that the plaintiff had failed to discharge the burden of proof that the testator was of sound mind and health by evidence of competent and disinterested witness. It was held that the testator did not have sound health and mind to make the Will.

It was further held that the propounder had failed to show reason why he had actively participated in the preparation of the Will like purchasing Stamp paper, giving dag and patta number to the scribe and directing the said scribe to write a Will, which the testator would have done, as such, it was held that the testator could not remove the suspicious circumstances. Relying on the case of Rabindra Nath Hazarika Vs. Phulti Hazarika, 2002 (3) GLT 484, it was stated that this Court had observed that the registration of a Will was not sufficient to establish genuine execution and attestation. Relying on the in his cross-examination of PW-2, the learned trial court took note of the statement that while PW-2 was writing the Will, the testator was not nearby his table and only after completing the writing he called out the testator and then he took his signature of the testator and attesting witnesses, namely, Niranjana Mallik and Kalipada Ghosh and that he could not remember where the testator was while he took signatures of the attesting witnesses as well as that while he was writing the Will, propounder was sitting with him. Hence, it was held that the PW-2 was writing the said Will as per direction of the propounder that the Will was not written as per the statement of the testator nor the Will was read out to the testator after completion of writing. Therefore, the testator was held not to be aware of the contents of the Will where he had put his thumb impression. The learned trial court relied on the evidence of PW.3, Niranjana Mallik, who had stated that he did not know testator but the testator was identified by Nikhil Chandra Sarkar to him. The said Nikhil Ch. Sarkar was stated to be brother of the wife of the propounder and therefore, the learned trial court considered him to be an interested witness. It was held that no independent witness was examined as to the identity of the testator before the Deed writer and the Sub- Registrar. Hence, it was held that the propounder had failed to prove that the testator had come to the Sub-Register Office and his presence was held to be doubtful. The learned trial court also took note of the statement made by PW-3, Niranjana Mallik, in his cross examination that he and Narayan Sarma were both deed writers and when a deed writer wrote the Will, other co-deed writers generally became witness of such Deed, as such, it was held that the PW-3 had signed the Will as a attesting witness at the request of Narayan Sarma without knowing its contents. Hence, the

evidence of the PWs was held to be unreliable. The lack of explanation by the propounder as to why no villagers were made as witnesses, was

viewed by the learned trial court as suspicious circumstances. As such, due to the existence of various suspicious circumstances, it was held that

the Will (Ext.1) was a sham Will. Accordingly, the issue No.3 was decided in negative by holding that the propounder was not entitled to any

probate. Resultantly, the suit was dismissed on contest.

11. The learned senior counsel for the appellant submits that the basic plea of the respondents was that the land which was bequeathed to the

propounder was the land which was possessed by him. However, the learned trial court did not consider that the total land belonged to Late Iswar

Chandra Mandal was 21 Bigha 3 Katha 13 Lechas and, as such, the said land was divided into three parts. It is further submitted that the learned

trial court since the very inception, viewed the case of the appellant with great suspicion and found out suspicious circumstances where there was

none that too without any evidence merely on the basis of surmises and conjectures. It is submitted that the learned trial court was oblivious of the

fact that under the provisions of Section 59, Explanation - 4 of the Succession Act, 1925 even a person who is ordinarily insane may make a Will

during interval in which he is of sound mind. But in this case, without any evidence, the illness of asthma and dysentery had created an impact in the

suspicious mind of the learned trial court that the testator did not know what he was doing. It is submitted that by incorrectly interpreting the

provision of Section 59, Explanation -4 of the Succession Act, 1925 the said ordinary and commonplace illness of asthma and dysentery was

accepted as a ground to negate the Will on the ground that the testator did not have sound mind. It is submitted that the registration of the Will

normally takes place in a single sequence of transaction where the testator will sign the Will and simultaneously the attesting witness also sign the

Will and the execution is endorsed by the Sub-Registrar if such a document is presented before him for registration. It is submitted that although in

the present case in hand, the evidence of PW-1, PW-2 & PW-3 had established that the scribe, the testator as well as the attesting witnesses had

signed in presence of each other, the learned trial court had erred in law in not considering the said Will as duly executed without any suspicion

clouding it.

12. It is submitted that the suspicion of the court must be well founded on the basis of cogent materials available on record. Relying on the case of

Niranjan Umeshchandra Joshi Vs. Mridula Jyoti Rao and others, (2006) 13 SCC 433, it is submitted that the propounder is required to prove that

the testator had signed the Will and that he had put his signature out of his own free will having a sound dispossession of mind and understood the

nature and effect thereof. In the present case, as sufficient evidence was brought on record that the testator was called by the scribe to sign it and

that the Will was registered in the office of the Sub-Register and countersigned by two attesting witnesses out of which, the PW.3 and PW.4 , who

are the attesting witnesses that there was due attestation and that the testator had a sound dispossession of mind, the onus of the propounder ought

to have been held to be duly discharged and only thereafter, the onus would be shifted on the propounder to remove the suspicion, if such

suspicion still remained in the mind of the court. It was submitted that there was no suspicious circumstance at all in the execution of the Will and

such a suspicion was assumed erroneously by the learned trial court. It is submitted that a mere fact that the appellant had given the particulars of

dag and patta number of the land to the scribe, and had purchased the stamp papers, etc. the same was not a ground for concluding that the

appellant had actively participated in the making of the Will by disbelieving the genuineness and voluntariness of the Will.

13. Per contra, the learned Counsel for the respondent has submitted that the grounds which have clouded the Will by existence of suspicious

circumstances are as follows:-

a. By virtue of the Will, the respondent was sought to be deprived of his share in the property left behind by the testator, although he was an heir of

Class-II under the Hindu Succession Act, 1956.

b. The propounder of the Will had taken active participation in the preparation of the Will. He had taken the executor for registration of Will. He

had instructed the Deed Writer (PW-2) to prepare the Will. As per the statement made by PW-2 in his cross- examination, while the Will was

being written by him, the testator was not seen to be present but the propounder was sitting with him.

c. As per the statement given by the PW-2 in his cross examination, after the Will was written, he had taken the signature of the testator, he asked

his colleague deed writer, i.e. the PW-3 to sign as attesting witness, who readily obliged because according to the said PW-3, it was the prevailing

practice that if one Deed Writer was writing the deed/ will, the nearby sitting Deed Writer will sign as witness. Thus, the attesting witness and the

scribe did not personally know the testator, and they had relied on the PW-4 (brother of wife of propounder) for the identity of the testator.

d. The land which was bequeathed by the testator was not in his possession but was in the possession of the respondent.

e. At the time of executing the Will, the testator was suffering from asthma and dysentery, which proved that he was not in a sound disposition of mind.

f. PW-4, namely, Nikhil Ch. Sarkar was stated to be brother of the wife of the propounder therefore, he was rightly considered as an interested witness.

g. That it is well settled that at least one the attesting witness should be examined to prove the will and that the attesting witness should speak not

only about the testator's signature on the Will, but also that each of the witnesses had signed the will in the presence of the testator, but in this case,

the PW-2 had deposed in his cross- examination to the effect that after completing the writing he called out the testator and then he took his

signature of the testator and Niranjan Mallik and Kalipada Ghosh and that he could not remember where the testator was while he took signatures

of the attesting witnesses.

h. It is submitted that once the will is shown to be surrounded by suspicious circumstances, the courts are bound to examine those circumstances

and therefore, it is no longer a mere question of proving the Will, for which a mere registration is not sufficient, but it becomes a question of

satisfying the conscience of the court by putting the onus on the propounder of clearing all doubts on the Will as the judgment would operate in

rem.

14. In support his argument, the learned Counsel for the respondent has relied on the following cases:-

a. Yumnam Ongbi Tampha Ibemma Dev Vs. Yumnam Joykumar Singh, (2009) 4

SCC 780 ;

- b. Bharpur Singh Vs. Shamsheer Singh, (2009) 3 SCC 687;
- c. Ramchandra Rambux Vs. Champabai & Ors., AIR 1965 SC 354;
- d. Gurdial Kaur Vs. Kartar Kaur, (1998) 4 SCC 384;
- e. Smt. Debeswari Konwar Vs. Mohendra Konwar, (1984) 2 GLR 477;
- f. Ramendra Shah Vs. Shew Ram Shah & Ors., (2015) 2 GLR 477;
- g. Kushal Kumar Das Vs. Nilima Mudoi, (2014) 2 GLR 262.

15. Considered the rival submissions made by the learned Senior counsel for the appellant and the learned Counsel for the respondent. The only point of determination which arises in this case is - Whether the propounder has not been able to successfully dispel the suspicious circumstances

which have clouded the preparation, execution and registration of the last Will of Jugindra Chandra Mandal?

16. On perusal of the LCR, it is seen that the Will (Ext.1) was not executed on a stamped paper, but was written on a demi paper, commonly

known as cartridge paper. Judicial notice can be taken of the fact that Will is exempted from payment of stamp duty in this State. Hence, no stamp

duty was charged in the said Will by the Sub- Registry. It is a common practice by almost all petition/ deed writers that they as well as many

learned Advocates practicing in Mofussil Courts would ask the clients to purchase cartridge paper, stamp papers, etc. from the stamp vendors.

Therefore, this Court perceives no suspicious circumstances, if the propounder, who is younger in age to the testator would purchase the cartridge

paper, stamps, etc. and provide it to the petition/ deed writer, as was done in this case. The suspicious circumstances which exists in the Will is that

the testator had not signed the Will, but it was marked with LTI of the testator, but the LTI impression was taken in the right hand upper part of the

two pages of the Will. There was no LTI impression of the testator at the end of the recital and/or the body of the Will. This, according to this

Court is a suspicious circumstance because every deed/ Will is generally signed at the bottom where the text of the Will ends.

17. Although the PW-2, Narayan Chandra Sarma (Deed Writer), had stated in his cross examination that the Will was written at the instance of

the testator at about 1.30/2.00 p.m., and that it took him about one hour to

write it, which was read out to the testator, who put his thumb impressions [Ext.1 (1) and 1(2)] and that the attesting witnesses, namely, Niranjana Mallik and Kalipada Ghosh had put their signatures on Ext.1 after it was signed by the testator. However, the said evidence in so far as the time of writing of the Will is concerned, the same does not match with the evidence of PW-1, as per whose evidence, the Will was written at about 11.00 a.m. and it took about half an hour to write it. However, on the perusal of the back-page of the said Will, it appears that the Sub-Registrar, Nagaon has given the time of the registration of the Will at 2.40 on 19.10.2001. Therefore, the evidence of PW-1 i.e. the propounder of the Will is not believable.

18. It is admitted by PW-2 that the testator was not sitting with him i.e. the scribe when the Will was being drafted, but the propounder was with the said scribe (PW-2) at that time, which proves that the propounder had actively participated in the preparation of the Will. Then the PW-2 took the thumb impression of the testator. Thereafter, the signatures of attesting witnesses were taken. This is contrary to the manner of executing the Will as prescribed in Section 63 of the Succession Act, 1925 because this part of statement of PW-2 in his cross examination proves that at the time when the attesting witnesses had signed the Will, the said Will had already been marked with LTI of the testator and that the testator did not acknowledge before the attesting witnesses his mark on the Will.

19. The version of the PW-2 in so far as reading out of will to the testator and signing by the attesting witness is concerned, the same stands demolished in course of his cross examination, wherein the said PW-2 had stated that while he was writing the Will, the testator was not nearby his table and only after completing the writing he called out the testator and then he took his signature of the testator and Niranjana Mallik and Kalipada Ghosh and that he could not remember where the testator was while he took signatures of the attesting witnesses. Therefore, the fact that the propounder was providing the patta and dag number of the land and that as per the statement made by PW-2 in his cross examination that while he was writing the Will, and that the propounder was sitting with PW- 2 at the time when he was writing the Will, in the opinion of this Court, constitutes enough material to justify the suspicion of the court as to the

voluntariness of the Will. It was rightly held that the PW-2 had written the Will as per direction of the propounder, and that the Will was not prepared as per the statement of the testator, and that the Will was not read out to the testator after completion of writing. Moreover, even as per the evidence of PW-1, in the Sub-Registrar's Office the testator had told the Sub-Registrar that he had given the land to the executor-propounder, but that is not the requirement of Section 63 of the Succession Act, 1925, where it is prescribed that the intention of bequeathing must be disclosed by the testator to the attesting witness. Hence, in the present case in hand, the appellant has not been able to dispel the suspicion by leading sufficient and cogent evidence. Therefore, in this case, the LTI impression of the testator in the Will alone was not sufficient to prove that he was aware of the contents of the Will where his LTI impression was taken by PW-2.

20. In the case of *Niranjan Umeshchandra Joshi (supra)*, cited by the learned Senior Counsel for the appellant, the Hon"ble Supreme Court of India has enumerated several circumstances which have been described as suspicious circumstances, viz., (i) when doubt is created in regard to the condition of mind of the testator despite his signature on the Will; (ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; (iii) where the propounder himself takes prominent part in the execution of the Will which confirms on him substantial benefits. In para 37 thereof, it has been mentioned that there exists a distinction where suspicion are well founded and the cases where there are only suspicion alone and that existence of suspicion alone may not be sufficient. It was also mandated that the court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is not demanded from a judge even if circumstances of grave suspicion exist. Thus, the said judgment does not appear to help the appellant in any manner.

21. The circumstances, which is revealed from the perusal of the LCR is that the testator had died on 31.10.2001. As per entries made in the jamabandi (Ext. Ka), in terms of order dated 01.04.2002, passed by the Circle Officer, in place of Iswar Namsudra, the names of his legal heirs, namely, Upendra, Jugindra and Sachindra, sons of Iswar was mutated. Then the name of Jugindra (testator) was struck off and in his place the

names of Upendra and Sachindra, sons of Iswar was mutated. Then in place of Late Upendra, the names of his legal heirs, i.e. Sarat and Bharat,

sons of Upendra and Smt. Alakmoni, wife of Upendra was mutated. Thereafter, the death of Jugindra Chandra Mandal (testator) was registered

on 17.04.2002 and the Death Certificate (Ext.2) was issued by the concerned Registrar of Births & Death. The Probate petition was then filed on

24.04.2002. This is the surrounding circumstances and chain of events leading to filing of the probate petition.

22. As per the ratio laid down in the case of Ramchandra Rambux (supra), the learned trial court has rightly looked into the surrounding

circumstances as well as the probabilities so that it may be able to form a correct idea of the trustworthiness of the witnesses. On perusal of the

evidence of the PW-2 and PW-3, this court does not find any infirmity in the finding recorded by the learned trial court disbelieving that the

attesting witness (PW-3) and the scribe (PW-2) knew the testator. Hence, as per the ratio of the case of Gurdial Kaur (supra), if any doubt exist

as to identification of the executor of Will, the learned trial court was within the four corners of law in not accepting the Will as a valid one.

23. Thus, viewed from all the angles as discussed above, this court is of the considered opinion that the propounder has not been able to

successfully dispel the suspicious circumstances which has clouded the preparation, execution and registration of the last Will of the testator,

namely, Jugindra Chandra Mandal. From the evidence of the PWs, this court cannot come to a conclusion that the Will was prepared at the

command of the testator or that the Will was prepared as per his on his own volition. Rather, it has come to light that the propounder had actively

participated in the preparation of the Will. He was the one who was dictating the Deed Writer, namely, Narayan Ch. Sarma (PW-2), while the

testator was admittedly not present at the time when his purported Will was being written. As the testator had put his LTI impression on the said

purported Will, it is presumed that he does not know how to read and write, but the Will was not read over or explained to him before his thumb

impression was taken by the Deed Writer (PW-2). The thumb impression on the right hand top corner of the Will, without any LTI impression at

the end of the Will shows another instance of presence of suspicious circumstance. The signature of attesting witnesses were taken by the said

PW-2, but cannot he could not remember where the testator was while he took signatures of the attesting witnesses. This Court is bound by the ratio laid down by the Division Bench of this Court in the case of Smt. Debeswari Konwar (supra), where it has been held that if the Will is already signed, there must be a personal acknowledgement of his signature or mark as the case may be by the testator to the attesting witness, which is conspicuously absent in the evidence of the PWs. The point of determination is answered accordingly.

24. Therefore, this appeal fails and accordingly, the appeal is dismissed. The judgment and order dated 01.10.2007 passed by the learned

Additional District Judge, Nagaon in T.S.(P) No. 49/2002 is affirmed.

25. The parties are left to bear their own cost.

26. Return back the LCR.