

(1953) 02 CAL CK 0013
In the Calcutta High Court
Case No : A.F.O.D. (Probate) No. 39 of 1951

Sarat Chandra Mondal and Others	Vs	APPELLANT
Panchanan Mondal and Another		RESPONDENT

Date of Decision : 11-02-1953

Acts Referred:

Evidence Act, 1872 — Section 90
Succession Act, 1925 — Section 102, 103, 232, 268, 59

Citation : AIR 1953 Cal 471 : 58 CWN 271 : (1955) 1 ILR (Cal) 55

Hon'ble Judges : Debabrata Mookerjee, J; Das, J

Bench : Division Bench

Advocate : Amarnath Roy Choudhury, for the Appellant; Mrinal K. Ghose and Jogesh Ch. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—This is an appeal by the objectors against a decision of Mr. Rule N. Roy, learned Subordinate Judge, 6th Court, 24-Farganas, granting Letters of Administration to the estate of Giridhar Mondal with a copy of the Will dated 18-2-1920, annexed.

2. The Will which is in question in this appeal was executed by Giridhar Mondal on 18-2-1920, and was registered on 10-3-1920. The terms of the Will will be set out hereafter. In order to appreciate the contentions which have been urged in this appeal it is necessary to set out the genealogical tree.

KALACHAND	
	Harichanran Girdhar (restator)
Natabar Netaji Meganath Sastibaz	= Bhangamani
Jogendra Debendra Annamdamani (daughter) Bangamali Atul	
Nabadwip Ganesh Kartik	
Shyamcharan (Executor) Dhruba Sarat Bharat Jatin Ratikanto Badal	=

Ushanbala | _____ |

_____ | | | | | Panchangn Madhab Narayan(minor) Amit
Durgaflas (unior) Dulal (minor)

The testator was suffering from dysentery for some time and it is admitted by the witnesses on behalf of the propounder that his hands and feet - were swollen and that he was physically weak. No steps were taken to propound the Will till 1947. The testator died on 11-7-1921. The learned Subordinate Judge, as I have already said, granted Letters of Administration with a copy of the Will annexed. Mr. Roy Choudhury who has appeared in support of the appeal has raised several contentions.

3. In the first place, he was contended that the Will has not been proved to have been duly executed and attested. In particular, he has admitted that there is no evidence that the formalities attending due attestation were complied with in this case. He has referred us to the evidence of the witnesses who had deposed to the attestation of the Will. The evidence of these witnesses merely shows that the testator signed the Will and that they attested the Will. It has not been definitely stated by them that they signed in the presence of the testator. On this submission, a question of law arises, namely, whether the Court is entitled to presume the due execution and attestation of a Will such as the present one is, u/s 90, Evidence Act. The Will bears the date 18-2-1920. It was registered on 10-3-1920. The testator died on 11-7-1921. The Will was tendered for proof on 27-6-1950 and on that date the Will was proved by P. W, 1 Jogendra and was marked as Exht. 1.

4. u/s 90, Evidence Act, the Court may presume that any document purporting to be, or proved to be, 30 years old, and produced from, proper custody, was duly signed by the person by whom it purports to have been signed. There is also a presumption" that in case of a document which purports to have been signed and attested the Court may presume that it was duly signed and attested. The question which has been canvassed in this appeal is that the presumption which arises u/s 90, Evidence Act, should not be drawn in case of a Will the genuineness of which is in controversy in the Probate Court. The reason suggested is that the propounder may antedate the Will and thereby call in his aid the presumption u/s 90, Evidence Act. Some support for this view may be found in a decision of this Court in the case of "Shyam Lal Ghosh v. Rames wari Bosu" AIR 1916 Cal 938 . In a later decision of this Court in the case of -- " Gobinda Chandra Pal and Others Vs. Pulin Behari Bannerjee and Others, , the view expressed in the above case of AIR 1916 Cal 938 was distinguished on the ground that the observations therein contained were "obiter dicta". The view taken in the case of Gobinda Chandra Pal and Others Vs. Pulin Behari Bannerjee and Others, was affirmed by this Court in the case of -- "Mahendra Nath Surul v. Netai Charan Ghosh" ILR (1943) Cal 392 . The view taken in the last two decisions of this Court has now been approved by the Judicial Committee in the

case of --"Munnalal v. Mst. Kashibai" AIR 1947 P C 15

5. This, however, does not dispose of another contention which was raised on behalf of the appellants, namely, that the period of three (thirty?) years would run not from the date of the Will but from the date on which, the testator died. The reason given for this contention is that the Will does not operate till the death of the testator. This submission cannot, however, be accepted. The reason for the rule embodied in Section 90, Evidence Act, is based on the impossibility of obtaining living testimony to the signing or the handwriting of a document. If this is a reason which underlies Section 90, Evidence Act, it logically follows that time should run from the date which the document bears whether it is a Will or any other document. Section 90 speaks generally of "any document". This view is supported by the decision in the case of -- "Doe v. Woliey" (1828) 8 B & C 22 In my opinion, the view taken in the last cited decision is based on sound grounds and must, be accepted.

6. It was further contended that even assuming that the period of 30 years can be computed from the date the Will purports to bear, the outer limit of time is not the date when the document is sought to be proved but the date when the document is filed in Court. It was contended that as this document was filed for the first time in 1947 and as the period of 30 years had not elapsed then, no presumption u/s 90, Evidence Act, can be drawn. This question, however, is no longer open to argument. In the case of -- AIR 1936 15 (Privy Council) it was decided by the Judicial Committee of the Privy Council that the material date is the date when the document is tendered in evidence. In this case, as I have said, the document was tendered in evidence on 27-6-1950. Thirty years had, therefore, elapsed at the date when the document was sought to be proved in Court. The presumption u/s 90 would therefore be attracted to the Will which is now in question.

7. A further question arises as to the extent of the presumption which arises u/s 90, Evidence Act, in regard to Wills. The Statute says that when a document purports to be executed and attested, the presumption is one of due execution and attestation. This involves the idea that the document was executed duly and attested duly; in other words, that the document was validly executed. This involves a further conception that the testator had testamentary capacity to execute the Will. This view was taken by the Judicial Committee of the Privy Council in the case of -- "Munnalal v. Mst. Kashibai" AIR 1947 P C 15. In this case Sir John Beaumont delivering the opinion of the Board observed that the presumption u/s 90, Evidence Act, connotes that the testator was of sound mind and knew that what he was about. This, the learned Judge went on to add, was fortified under the more general provisions of Section 114, Evidence Act.

"since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about."

The result of the above discussion leads me to hold that the Court may presume

that the Will in question was duly executed and attested in accordance with the formalities required by the Succession Act.

8. Mr. Roy Choudhury, however, contends that the presumption that the Court may presume the due execution and attestation u/s 90, Evidence, Act, is rebuttable and his submission has been that the evidence led on behalf of the propounder in this case rebuts the presumption which arises u/s 90 of the Evidence Act. He referred us to the evidence of P. W. 1 Jogendra, P. W. 2 Ganesh, P. W. 3 Kiran & P. W. 4 Bimal. He relied on the fact that P. W. 1 Jogendra and P. W. 2 Ganesh admitted that the Will was written by Nirod. The Will, however, shows that the writer was Satish Chandra Chatterji. His contention, therefore, is that the positive testimony of the two witnesses P. Ws. 1 and 2 contradicts the recital in the Will. This, however, does not demolish the presumption u/s 90, Evidence Act, for the reason that the recital in the Will that the writer was Satish Chandra Chatterjee may be an untrue one. The document is more than 30 years old, and it is difficult at this distance of time to explain under what circumstances the Will contained a recital that the writer was Satish Chandra Chatterjee. Mr. Roy Choudhury further pointed out that P. W. 3 Kiran deposed that the Will was written at one and the same sitting. He also pointed out that the will contained interlineations & that some of them were not in the handwriting of the writer of the Will. This, however, does not negative the presumption that the Will was duly signed & attested. It is possible that at the time when the Will was signed and attested some additions were made at the instance of persons present at the "Majlis" one of whom was a Pleader Satyendra Nath Banerjee. In fact, the Will contains an interlineation by him.

Mr. Roy Choudhury also relied on the fact that P. W. 4 Bimal whose signature appears in the Will deposed in Court to say that he could not write. We have examined the signature of Bimal and the signature shows that he was practically (illiterate. All these facts, therefore, do not rebut the presumption which the Court may draw u/s 90, Evidence Act. The Will was a registered one and was more than 30 years old and in the facts and circumstances of this case the Court should draw the presumption u/s 90, Evidence. Act. It must therefore be held that the Will was duly executed and attested.

9. Mr. Roy Choudhury also contended that the testator was under the influence of Shyama charan, the legatee under the Will. His contention is that the evidence of the witnesses on behalf of the propounder shows that the pro-pounder could not refuse a request made by Shyamacharan. He therefore contended that there was undue influence in this case. In order that the objector might successfully prove undue influence he must establish two facts, namely, that the propounder was in a position "to dominate the will of the testator and that in point of fact he did dominate the will in the particular case. This view is supported by the decision in the case of -- "Craig v. Lamoureux" AIR 1919 P C 132. In this case, there is no evidence whatsoever that in point of fact Shyamacharan used his influence, if any, and obtained from the testator the Will on the terms; which it contains. This

contention of Mr. Roy Choudhury must therefore be overruled.

10. Mr. Roy Choudhury next contended that there are suspicious circumstances attending the execution and the attestation of the Will and he referred us to the fact that there was undue delay in the publication of the Will and in making the application for probate of the Will. He referred us to the evidence on record that the parties were living jointly during all these years and that the Cadastral Survey Record of Rights recorded their joint possession. It appears, however, from the evidence of the objector Badal that Shyamacharan began to live separate 3 or 3 1/2 years prior to the date of his deposition. This would take us to a date shortly before the first application for the grant of Letters of Administration by Shyamacharan himself. The explanation for the delay might have been that the parties were living on good terms and Shyamacharan did not care to take out probate. The above fact therefore cannot be regarded as a suspicious circumstance in the facts of this case.

11. Mr. Roy Choudhury next contended that the present application for the grant of Letters of Administration must fail on the ground that administration of all the assets left by the testator had not been prayed for. It is submitted that the application for the grant of Letters of Administration does not mention the movables left by the testator. The testator died many years ago and it is difficult to say that the movables which he might have possessed at the date of his death existed at the date when the application for Letters of Administration was made. This fact was not put to any of the witnesses examined on behalf of the propounder. It is therefore impossible to say that the application for the grant of Letters of Administration has omitted to mention any part of the estate left by the testator.

12. It was also contended that the application suffered from the defect in not making the heirs of Dhruba as parties to the application for the grant of Letters of Administration. It must be observed however that the heirs of Dhruba are remoter heirs and citation on them was not necessary. In any event, the omission to state some of the members of the family of the testator is not a defect fatal to the proceedings to obtain the grant.

13. Mr. Roy Choudhury lastly contended that the propounder had no locus standi to apply for the grant of Letters of Administration. This contention is based on the ground that Shyamacharan who was the executor appointed by the Will died before he obtained the grant and the present application for the grant of Letters of Administration was made by his heirs. It was contended that Shyamacharan was not a residuary legatee but was a universal legatee under the terms of the Will of Girdhar Mondal. As such, his legal representatives, namely, the present applicants, are not entitled to obtain a grant. It is not disputed that if Shyamacharan was a residuary legatee, then under the terms of Section 233, Succession Act, the present applicants would have locus standi to apply for the grant of Letters of Administration with a copy of the Will annexed. The question therefore is whether Shyamacharan was a residuary legatee or a universal

legatee. Neither of these terms has been defined in the Succession Act. A universal legatee is undoubtedly one who by virtue of the Will is entitled to the whole of the estate left by the propounder. In the present case, the Will contained the following provisions. It sought to give a life estate to the widow which was followed by another life estate in favour of the widowed daughter and this was followed by an absolute bequest of the entire estate in favour of Shyamacharan. The Will contained provisions for the performance of the funeral rites and *shraddha* of the testator, and of his widow. Paragraph 4 of the Will provided for the appointment of Shyamacharan as executor. There was a further direction therein that Shyamacharan would collect the assets, manage the properties and pay the debts of the testator which amounted to Rs. 470/-. It also contained a provision that in case the income was insufficient, the executor would be entitled to sell or grant a lease of a part of the estate subject to the reservation that sufficient property is left for the maintenance of the widow and the widowed daughter. The above provisions clearly indicate that Shyamacharan was not the universal legatee. The whole of the estate was not devised to Shyamacharan. It was subject to two previous life estates and was subject to the burden of providing for the funeral rites and *shraddhas* of the testator and his widow and for the payment of the debts left by the testator.

14. The question, next arises whether Shyamacharan could be regarded as a residuary legatee. As I have already observed, the term "residuary legatee" is not defined in the Act. In *Williams on Executors*, 9th Edn. Vol. II, p. 1310 it is observed,

"No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the Will, that the surplus of his estate after payment of his debts and legacies shall be taken by a person there designated".

It then follows that the residuary Legatee must be vested with the surplus and residue of the property left by the testator at his death. This statement of the law underlies Sections 102 and 103, Succession Act. Illustration (b) to Section 102 to which Mr. Ghose appearing for the respondent drew our attention seems to support the view that a legatee such as Shyamacharan is, is a residuary legatee. The illustration is in these words:

"A makes his Will, with the following passage at the end of it: I believe there will be found sufficient in my banker's hands to defray and discharge my debts which I hereby desire B to do and keep the residue for her own use and pleasure. B is constituted the residuary legatee".

In the present case the Will conveys the estate to Shyamacharan but after two life estates, one in favour of the widow and another in favour of the widowed daughter, had come to an end The Will also directs Shyamacharan to perform the funeral rites and *shraddhas* of the testator and testator's widow as well as to pay the debts in a certain manner indicated already. The entire estate of the testator

did not devolve on the testator's death on Shyamacharan. It was subject to certain reservations made in the Will. Shyamacharan merely gets the rest and residue of the estate left after the two life estates have ceased and after the provisions contained in the Will for payment of debts and sradh expenses had been complied with. In these circumstances, in my opinion, Shyamacharan must be regarded as a residuary legatee and as such u/s 233, Succession Act, his heirs are entitled to obtain Letters of Administration. The view taken by me is supported by a decision of this Court in the case of -- Haripada Saha and Another Vs. Gobinda chandra Saha and Others .

15. All the contentions raised on behalf of the appellants fail. This appeal is therefore dismissed with costs, hearing fee being assessed at two gold mohurs.

Debabrata Mookerjee, J.

16. I agree.