

(2018) 09 CAL CK 0046
In the Calcutta High Court
Case No : First Appeal No. 128 Of 2007

Smt. Archana Mishra & Anr	Vs	APPELLANT
Smt. Dipali Chowdhury & Anr		RESPONDENT

Date of Decision : 19-09-2018

Acts Referred:

Indian Succession Act, 1925 — Section 211, 213, 222, 227, 232
Limitation Act, 1963 — Section 14

Citation : (2018) 09 CAL CK 0046

Hon'ble Judges : I. P. Mukerji, J; Amrita Sinha, J

Bench : Division Bench

Advocate : Chandraday Ray, Probal Kumar Mukherjee, Shebatee Datta

Final Decision : Partly Allowed

Judgement

P. MUKERJI, J.

I have had the privilege of going through the draft judgment proposed to be delivered by my sister, Justice Amrita Sinha in this appeal. I am in full

agreement with the conclusions reached by her ladyship. Nevertheless, I would like to add a few words.

A Will is the intention of a testator concerning his property to be carried into effect after his death. It is a declaration made formally and intended to

have legal effect. Under Section 222 of the Indian Succession Act, 1925 probate shall be granted to the executor appointed by the Will. Under Section

232 letters of administration may be granted when the testator has executed a Will but has not appointed an executor. Under Section 211 of the said

Act, 1925 the executor or administrator is the legal representative of the deceased person. Under Section 213 no right as executor or legatee can be

established in any Court of justice unless the Court has granted probate of the

Will under which the right is claimed or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed. Under Section 227 the probate of a Will when granted establishes the Will from the death of the testator or testatrix.

In our case Pulak Chowdhury, (he died on 23rd April, 2007 during the pendency of this appeal) son of Late Baikuntha Nath Sen made an application for grant of letters of administration in respect of the properties bequeathed to him covered by the Will of his mother, Kanarani Sen, executed on 8th March, 1977. An application for letters of administration but not probate had to be made because the Will did not appoint an executor. Obviously the issues framed in the application for the grant related to the due execution of the Will.

The learned Judge trying the case, in my opinion, very correctly, on analysis of the evidence came to the finding that the Will had been properly executed by the testatrix. That is all that the learned Judge had to do. He had no other declaration to make. He was not called upon to declare whether the properties bequeathed by the Will belonged to the testatrix or not at the time of her death. He only had to adjudge the genuineness of the Will and make the necessary declaration.

Now on 17th May, 1993 the testatrix allegedly made a gift of a part of the property covered by her said Will of 8th March, 1977 in favour of her daughter, Archana Mishra and grandson Debangsu Mishra. Kanarani Sen expired on 30th May, 1999. Making a Will in respect of a property did not fetter the right of the testatrix to make a gift of a part of it in her lifetime. If the gift failed the property bequeathed would go wholly to the beneficiaries of the Will. If it succeeded that part of the said property of the testatrix which existed at the time of her death would go to them.

The issues framed by the court did not deal with the validity of the gift. The learned Judge for reasons unknown made the legality of the gift an issue before him. He declared in his judgement and decree dated 21st Novemeber, 2005 that since the Will according to him was genuine, the Deed of Gift had to be invalid and made the said declaration. Here he went clearly wrong. He was trying to adjudge the title of the testatrix with regard to the subject matter of the bequest. He could not do so. He only had to adjudge the genuineness of the Will. In trying to determine and declare the

properties of the testatrix, he committed a very serious error.

Therefore, the decree passed by the learned Judge with regard to the alleged Deed of Gift is non-est and is set aside by this Court. The declaratory

decree that the appellants did not acquire any right, title or interest over the estate left by Kanarani is erroneous and is set aside. The rest of the

decree is affirmed. The validity of the gift may be tested in a proper proceeding. In the facts and circumstances of the case, Section 14 of the

Limitation Act, 1963 would apply to exclude the whole period of continuation of this proceeding from 2004 till this date. The appeal is partly allowed.

No order as to costs.

(I.P. MUKERJI, J.)

Amrita Sinha, J.:-

This is an appeal at the instance of the defendants challenging the judgment and decree dated 21st November, 2005 passed by the learned Additional

District Judge, First Court Purulia in L.A. Suit no. 1 of 2005 whereby the learned Court below granted Letter of Administration in favour of the plaintiff.

The appellant no. 1 is the married daughter, the appellant no. 2 is the grandson and the plaintiff/applicant of the L.A. Suit Pulak Chowdhury was the

son of Baikuntha Nath Sen and Kanarani Sen. The case of the appellants is that the suit property comprising an area of nine cottahs two chittaks

consisting of a building and vacant land in the district of Purulia was purchased jointly by one Baikuntha Nath Sen and Kanarani Sen by a registered

deed of sale in the year 1965. The parents of the parties resided at the said property.

Baikuntha Nath Sen died intestate in the year 1989 leaving behind Kanarani Sen (widow), Pulak Chowdhury (son) and Archana Mishra (daughter) as

his heirs and legal representatives. Kanarani Sen expired on 30th May, 1999 leaving behind Pulak Chowdhury and Archana Mishra as her heirs and

legal representatives. The appellants herein allege that Kanarani Sen executed a deed of gift in their favour on 17th May, 1993 in respect of her entire

share in the property in question. The deed of gift was duly registered in the office of the Registering Authority.

Dispute arose in between the brother and sister with regards to the ownership of the property in question. Pulak alleged that Kanarani Sen executed a

Will in his favour on 8th March, 1977. The said Will was alleged to have been registered but the original Will was not traceable. In order to claim

ownership Pulak initiated proceeding for obtaining Letter of Administration. Archana being a party in the said suit raised objection to the said grant on

the ground that Kanarani during her lifetime had transferred her entire share in the property in favour of the appellants by way of a registered deed of

gift being No- 2938 dated 17th May, 1993. The deed of gift was accepted by the donees i.e, the appellants herein.

The learned Court below upon appreciation of the evidence and upon perusal of the records held that the Will was valid and legal and allowed the

L.A. case and granted Letter of Administration in favour of Pulak Chowdhury. In the said judgment the learned Court below upon examination of the

parties held that no deed of gift was ever executed by Kanarani and concluded that the alleged deed of gift is nothing but a fake document and

Archana did not acquire any right, title and interest over the estate left by Kanarani.

During the pendency of this appeal Pulak Chowdhury expired leaving behind his wife Smt. Dipali Chowdhury and son Santanu Chowdhury as his heirs

and legal representatives. Dipali and Santanu have since been substituted in place and instead of the deceased Pulak Chowdhury. It is the specific

case of the appellants that in a suit praying for grant of Letter of Administration the learned Court below lacked inherent jurisdiction and adjudicated

the validity of the deed of gift which was duly registered before the Registering Authority and acted upon by the donor and the donees. It has been

submitted that the appellants were not required to prove the deed of gift in a suit praying for grant of Letter of Administration.

It has been submitted that in the absence of the original Will the learned Court below could not have verified the signature of the testatrix and as such

the suit ought not to have been allowed. It was further submitted that there are contradictory evidence of the witnesses wherefrom the execution of

the Will could not be conclusively proved. The respondents on the other hand submitted that the will in question was executed by the testatrix and duly

registered before the Registering Authority in presence of the witnesses. The said attesting witnesses deposed before the learned Court below and on

being satisfied with the evidence of the witnesses the learned Court below had rightly granted Letter of Administration in their favour. It was further

submitted that the executrix never executed any deed of gift in favour of the appellants herein and if any such document is produced the same may be treated as void, bad in law, fraudulent, manufactured, inoperative and not binding. It was further submitted that the appellants being fully aware of the existence of the Will managed to procure the alleged deed of gift embodying the name of Kanarani Sen Chowdhury. It was also submitted that the Will executed in favour of the predecessor in interest of the respondents was never revoked. It was submitted that the appellants intentionally and deliberately did not hand over the original Will to the applicant to prevent the applicant to obtain probate in respect of the said Will.

The issue before this Court is whether in a suit praying for Letter of Administration the learned Court below was entitled to arrive at a finding that the alleged deed of gift executed on 17th May, 1993 was a fake document and the appellants did not acquire any right, title and interest over the estate left by Kanarani Sen Chowdhury and whether the grant of the Letter of Administration was proper and valid. It is an admitted fact that the property in question was the joint property of Baikuntha Nath Sen Chowdhury and Kanarani Sen Chowdhury. Both the parties deposed that the property was purchased jointly by Baikuntha Nath and Kanarani by way of a registered deed of sale in the year 1965. The property had never been partitioned in between the co-owners. As per Pulak, Kanarani executed the alleged Will on 8th March, 1977 in respect of her share in the property. The Will was alleged to have been registered before the Registering Authority. Baikuntha Nath died intestate in the year 1989. On the death of Baikuntha Nath his share in the property devolved upon his widow Kanarani, son Pulak and daughter Archana in equal shares. As per Archana on 17th May, 1993 Kanarani executed a deed of gift in favour of her daughter and grandson Debangshu in respect of the building constructed on the property jointly owned by Baikuntha Nath and Kanarani.

In a proceeding for obtaining probate/Letter of Administration the applicant was only required to prove the Will. There was hardly any scope to verify the genuineness of the alleged deed of gift. The existence of the deed of gift does not disprove the existence and/or the veracity of the Will which was alleged to have been registered before the Registering Authority. The non-availability of the original Will rightly did not stand in the way of granting

Letter of Administration as the certified copy of the Will was available before the learned Court below. Moreover in the objection filed by the

appellants before the learned Court below it had been specifically stated that the appellants knew that Kanarani was made to write a Will by the

applicant/petitioner and the same was fraudulently produced before Sub-Registrar, Purulia for registration in the year 1977 as xerox copy of the same

has been supplied to the respondent. It was further stated that the respondent no. 1 came to know from his mother Kanarani that she never

intended to execute Will voluntarily but she was made to sign in some papers as she never on her own accord placed the same for registration in the

office of the Registrar, Purulia.

The learned Court below upon appreciation of evidence came to the finding that the Will had been validly executed. No document was placed before

the learned Court below that the said Will was revoked by Kanarani at any point of time. A person making a Will is free to execute a deed of gift in

respect of her property. In other words execution of a Will does not operate as a bar in executing a deed of gift in respect of the self-same property.

The effect of the two documents is entirely different from each other. A Will becomes operative only upon death of the executor whereas a deed of

gift becomes operative as soon as the same is executed and properly registered before the Registering Authority upon payment of the requisite

charges. A deed of gift is also required to be accepted by the donee. In both the above cases the party executing the document has to be the owner of

the properties to be willed or gifted.

In the instant case Kanarani as owner executed the alleged Will as well as the alleged deed of gift in respect of her share in the undivided property.

The alleged gift was accepted by the donees being the appellants herein and the same had been acted upon by the parties to the deed. The alleged

deed of gift was not necessarily required to be produced before the learned Court below in a proceeding praying for Letter of Administration of a Will

though had it been produced and/or exhibited then the dispute between the parties could have been cut short to a considerable extent. The contents of

the deed of gift were not known to the Court. The portion of the property alleged to have been gifted was also not clear. It had only been submitted

before the learned Court below that Kanarani had gifted the building to the

appellants. It is not in dispute that the property was not partitioned between the co-owners.

In the affidavit in chief filed by the appellant no. 1 before the learned Court below she had mentioned that out of love and affection Kanarani executed a deed of gift in favour of her daughter and her grandson in respect of 5/6th share of her property and the same was duly registered in the office of the Sub-Registrar, Purulia being registration no 2938 dated 17th May, 1993. The same was not an issue that was required to be decided in a suit for granting Letter of Administration.

The fact that a Will was executed is evident from the depositions made before the learned Court below. In the absence of and/or due to non-availability of the original Will the learned Court below granted the Letter of Administration on the basis of the certified copy of the registered Will. In the absence of primary evidence it is open to the court to rely upon secondary evidence and accordingly the learned Court below relied upon the certified copy of the registered Will and granted Letter of Administration on the same. What is required to be seen is whether the learned Court below rightly came to the conclusion that the Will was proved.

The plaintiff Pulak Chowdhury in his examination in chief had mentioned that he was not aware that his mother had executed a Will in his favour in the year 1977. Two years prior to filing of the suit he had a casual talk with his sister being the appellant No.1 herein wherefrom he got the knowledge of the Will. Thereafter Pulak entrusted his son to enquire about the Will in the office of the Sub-Registrar, Purulia and on enquiry his son obtained the certified copy of the Will. It is pertinent to mention that the proceeding praying for grant of Letter of Administration was filed in the year 2004.

The fact that the relationship between the brother and sister was a strained one is very clear from the statement made by Pulak wherein he stated that the appellants were by the side of Kanarani at the time of her death and the fact of death was also not made known to him. Pulak got the information about the death of his mother on the following day after her death from his son. Though Kanarani expired on 30th May 1999 Pulak filed the proceeding for obtaining Letter of Administration only in the year 2004. In the plaint Pulak did not mention anything about the execution of the deed of gift in favour of the appellants. Only after the appellants filed their written

objection in the Court below Pulak amended the plaint and incorporated the fact of execution of the deed of gift.

One Asit Baran Khan an employee of the district Sub-Registry office, Purulia examined himself as PW 1. He deposed that the scribe of the Will had been noted as Madhusudan Kundu and the attesting witnesses were Amar Chandra Ganguly and Tapas Kumar Sarkar. He further deposed that the Will was executed on 8th March, 1977 and the same was presented for registration by Kanarani on the same date.

Madhusudan Kundu examined himself as PW 3. He described himself as a deed writer. He deposed that as per the instruction of Kanarani he scribed the Will and Tapas Sarkar and Amar Ganguly were the two attesting witnesses. He deposed that he scribed the Will as per the instructions of

Kanarani. He further submitted that Kanarani personally read the contents of the Will and thereafter signed it in the presence of the witnesses Tapas

Sarkar and Amar Ganguly. He also submitted that the witnesses also signed the Will and Kanarani saw that the witnesses signed the Will. Thereafter

Kanarani presented the Will for registration. In the cross-examination Madhusudan deposed that he was present in the Court to depose in the matter

at the request of Pulak. He further submitted that he could not independently recollect when Kanarani executed the Will. He further could not

recollect the date of handing over the Will to Kanarani. He further submitted that he could depose only after consulting the certified copy of the Will.

He also submitted that Kanarani went to the Registry Office alone.

Tapas Kumar Sarkar examined himself as PW 4. He specifically submitted that Kanarani executed a Will about 7 years ago and he stood as attesting

witnesses. He submitted that Madhusudan Kundu scribed the Will and he along with one Amar Ganguly were the attesting witnesses. He further

submitted that Kanarani was present in the Registry Office along with an aged person but he did not know that fellow. In the cross-examination Tapas

submitted that he could not recollect that he signed the Will of Kanarani as attesting witnesses. He further submitted that he was not present at the

time presentation of the Will of Kanarani. He also submitted that he was not aware of the contents of the Will.

From the deposition of the witnesses it is seen that contradictory statements have been made by them. One of the attesting witnesses i.e, Amar

Ganguly had already expired and the other i.e, Tapas Sarkar stated that he could not recollect that he signed the Will of Kanarani as attesting witness.

Further he states that Kanarani executed a Will about 7 years ago. The alleged Will was executed on 8th March, 1977 and Tapas deposed before the

Court on 2nd May, 2005. Accordingly the witness of Tapas does not help the respondent in proving his Will in any manner whatsoever.

The learned Court below mis-appreciated the evidence given by PW 4 Tapas Sarkar and recorded that Kanarani went to the Registry Office alone

whereas Tapas has specifically stated that Kanarani went to the Registry Office along with an aged person. Since Pulak did not have any knowledge

of the Will till 2002 accordingly his deposition can hardly be taken into account for the purpose of proving the Will more so in the absence of the

original Will. The evidence of PW 1 being an employee of district Sub-Registrar is also of not much value. He only made his statements relying on the

certified copy of the Will. He did not have any personal knowledge about the Will and he further stated that he did not have any personal knowledge

whether the testatrix physically appeared in the office for registration of the Will.

The deposition of Madhusudan Kundu PW-3 seems to be convincing. He specifically deposed that he scribed the Will as per instructions of Kanarani.

He further submitted that he saw Kanarani signed the Will in presence of two witnesses and the two witnesses also signed the Will in her presence.

He further submitted that Kanarani presented the Will for registration. The cardinal point to prove a Will is that the testator must sign his Will in

presence of two or more witnesses present at the same time and such witnesses must attest and sign the Will in the presence of the testator. Each

witness should be able to say that he knows of his own knowledge that the testator had signed the document. The burden of proving due execution

whether by presumption or by positive evidence rests on the propounder.

In the instant case the burden of proving due execution was upon Pulak Chowdhury. He did not have any personal knowledge about the execution of

the Will. He had to rely upon the evidence of the witnesses. The learned Trial Judge rightly appreciated the evidences given before him by the

witnesses and came to the conclusion that the Will had been sufficiently proved and there was no bar to grant Letter of Administration in favour of the

applicant. The learned Court below ought to have restricted his judgment only to

the extent of proving the genuinity of the Will.

At the time of grant of the Letter of Administration the learned Court below erroneously held the alleged deed of gift as a fake document and

incorrectly and illegally declared that the appellants did not acquire any right, title or interest over the estate left by the deceased Kanarani. As the

deed of gift was not under challenge in the instant proceeding the learned court below did not have any jurisdiction to adjudicate the same and declare

the same to be a fake document. Whether the alleged deed of gift was at all executed or not or whether the same was genuine or not is an absolute

different cause of action and the same cannot be decided in a proceeding praying for grant of Letter of Administration. It is well settled that the Court

in a proceeding for probate/Letter of Administration does not decide questions of title. The Court in probate/Letter of Administration proceedings is

only concerned with the issue as to whether the document set forth i.e, the Will has been duly executed by the testator voluntarily and with a free will;

and whether the testator was at the time of the execution of the document in a sound and disposing state of mind. The testamentary court does not

determine questions of ownership or title to the property but whether the testator has executed his testamentary instrument. In *Ishwardeo Narain*

Singh vs. Smt. Kamta Devi AIR 1954 SC 280 the Court held that the Court of probate is only concerned with the question as to whether the

document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the

time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the

probate Court. Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the Will and the Court itself is under

duty to determine it and preserve the original Will in its custody. The Succession Act is a self-contained code insofar as the question of making an

application for probate, grant or refusal of probate or an appeal carried against the decision of the probate Court.

This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate Court in the manner

prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the

executor and the valid execution of the Will. Thus it does no more than establish the factum of the Will and the legal character of the executor.

Probate Court does not decide any question of title or of the existence of the property itself.

The above decision and principle enunciated therein was relied upon by the Supreme Court in the case of Chiranjilal Shrilal Goenka (deceased through

lrs.) vs. Jasjit Singh & Ors. (1993) 2 SCC 507 placed by the appellant on the point that a decree passed by the Court without jurisdiction of the subject

matter is a coram non iudice. The appellant's case is that the testamentary court lacked inherent jurisdiction to decide the legality of the deed of

gift which was a validly executed and registered document. The decision of Ishwardeo Narain Singh vs. Smt Kamta Devi (supra) was referred to by

their Lordships of the Supreme Court in Krishna Kumar Birla vs. Rajendra Singh Lodha and Others (2008) 4 SCC 300. In this decision the Apex

Court after an elaborate survey of the entire case history on the point reiterated the settled position of law that the jurisdiction of the Probate Court is

very limited and it should be confined only to considering the question of genuineness of the Will. The question of title, existence of the property,

construction of the Will relating to right, title and interest of any person etc. are beyond jurisdiction of Probate Court.

The Supreme Court in Babulal Khandelwal & Others vs. Balkrishan D. Sanghvi and Others 2008 (4) CCC 257 (SC) also has reiterated that the

probate Court does not decide any question of title or even the existence of the property itself. In this case their Lordships had referred to several

earlier decisions on the point including Krishna Kumar Birla (supra). It is not for the testamentary Court to decide the issue of title. The Court will also

not decide as to whether the testator had any title to the suit property or not. The limited jurisdiction of the testamentary Court is to decide the

genuineness of the Will.

In the present case the appellants claim that the testatrix did not have title over the property in respect of which Letter of Administration has been

issued because the testatrix had already transferred her share in the property by executing a deed of gift in their favour which had been duly

registered before the registering authority. They have also challenged the title of the testatrix in respect of the property which has been willed in

favour of the respondent. The appellants had no authority to challenge the title of the testatrix in view of several decisions referred to herein above.

Even if the title of the testatrix is challenged such issue will not be decided by the testamentary Court.

The grant of Letter of Administration does not confer and/or extinguish any right, title and/or interest in the property in question and the parties will be

at liberty to establish their individual and independent right before the competent Court in appropriate proceeding in accordance with law.

In view of the discussions made herein above the impugned judgment and order of the learned Trial Court dated 21st November, 2005 is liable to be

modified. This Court does not interfere with the grant of Letter of Administration in favour of the predecessor in interest of the respondents but set

aside the decision of the learned Court below declaring the deed of gift to be a fake document. The decision that the appellants did not acquire any

right, title and interest over the estate left by Kanarani is also set aside. The appeal is partly allowed on the same terms as Mukerji, J. However there

will be no order as to costs. Urgent certified photo copy of this judgment, if applied for, be supplied to the parties or their advocates on record

expeditiously on compliance of usual legal formalities.