
(1983) 12 GAU CK 0002
In the Gauhati High Court
Case No : F.A. No. 32 of 1975

Smt. Debeswari Konwar and Another APPELLANT
Vs
Sri Mahendra Konwar and Others RESPONDENT

Date of Decision : 21-12-1983

Acts Referred:

Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (1984) 2 GLR 477

Hon'ble Judges : T.S. Misra, C.J.; K.N. Saikia, J

Bench : Division Bench

Advocate : R.C. Choudhury and D.C. Chakravarty, for the Appellant; D.C. Mahanta, D.P. Chaliha and B. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Misra, C.J.—This, appeal arises out of a proceeding for grant of letters of Administration. The Petitioners had filed an application in the Court of the District Judge, U.A.D, at Jorhat the basis, of a will said to have been executed by Benudhar in the month of March, 1954. The petition was resisted by the Opposite Party. The learned District Judge having come to the conclusion that the attached will had not been proved in accordance with law rejected the said application.

2. In order to appreciate the facts of the case it would be appropriate to give below the genealogical table:

3. The Petitioner Dombeswari is the wife of Manik who is son of Benudhar. The other Petitioner Tileswar is the son of Manik. Benudhar had two wives Sepeti and Kankati. Manik as the son of Sepeti. The caveat was filed by Kaoakati, the second wife of Benudhar. It was contended before the learned District Judge that the will was not genuine and should not have been admitted in evidence for the purpose of granting letters of, administration. The application was resisted on other grounds as well which are not material for the purposes of his appeal. In view of the objection raised by Kankati the Petitioners examined Jagannath Barua, P.W. 1

to prove the procution(SIC) and attestation of the will. He had also examined ton Gogoi, P.W. 2 another witness in the case. Debeswari also appeared as a witness in the case to substantiate her claim, Kankati was examined as P.W. 4 and Tileswar as P.W. 5 in he case. The Court below found that the statement of Jaganath Barua was not sufficient to prove the attestation and execution of the will in accordance with law as other witnesses had proved the execution and attestation of the said will. the Court below rejected the application for grant on letters of administration.

4. For the Appellants it was urged that the Court below erred on(SIC) holding that the execution and attestation of the will had not been proved. In support of his contention the learned Counsel for the Appellant referred us to the provisions of Section 63 of the Indian Succession Act, Section 68 of the Indian Evidence Act and Gansamdoss Naryandass v. Gulab Bi Bai AIR 1927 Mad 1054. Before we examine the evidence on the record it would be appropriate to refer to the provisions of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act.

Section 68 of the Indian Evidence Act which deals with the proof of execution of document required by law to be attested reads as below:

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

5. Section 68 provides that any document which is required by law to be attested shall not be used as evidence until one attesting witness at least has been examined in the case to prove the execution of the document. It is a common ground that a will is a document which is required by law to be attested. For the grant of letters of administration on the basic of a will it is necessary, that the will should be produced in the Court and its" execution should be proved in accordance with the provisions of Section, 68 of the Indian Evidence Act by calling at least one attesting witness who may be alive and may be subject to the process of the Court and capable of giving evidence. If the execution the document is not so proved it" would not be used as an evidence in the case, Section 63 of the Indian, Succession Act requires a will to be attested by two or wore witnesses, Sub-clause (c) of Section 63 lays down the manner of attestation of a document by witnesses. It .stipulates that the will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark, to the will, or bad seen some other person signing the will in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark no the will. However, no particular form of attestation shall be necessary. So, when a will is produced in Court as a piece of evidence its execution shall be proved by calling an attesting witness who shall state in clear terms that the testator has signed the will in his presence and that the attesting "witnesses had signed the will as a witness in

presence of the testator. If the will had already been signed by the testator then there must be a personal acknowledgment of his signature or mark as the case may be by the testator to the attesting witness. In other words, if the testator had already signed the will he should inform the attesting witness that he had already signed the will. He should acknowledge the fact before the attesting witnesses that he had already signed the will point out his signature on the will and ask each witness to attest it by putting his signature or thumb mark as the case may be on the document.

6. In the case in hand the will which was produced before the Court was said to have been executed by Benudhar and was also said to have been attested by two witnesses namely Jagannath Barua and Thireswar Bordoloi. The Petitioner called Jagannath Barua as P.W. 1 in the case. He is a Pleader. He stated that the will was written by Nasiruddin and was attested by another witness namely Thireswar Bordoloi. Nasiruddin was dead. In his examination in chief Jagannath Barua stated that Benudhar had got the will written and after he same was written it was read over to him and was then signed by him. After perusing the document he pointed out that it was signed by the executants and also by him as well as Nasiruddin and Thireswar, Signatures of these persons appearing on the will were marked as Exts. 1 (1), 1 (2), 1(3) and (4) respectively. He also proved his signature on the application for a letter of administration which was marked as Ext. 2(1). In the cross examination this witness Jagannath Barua, however, stated that he had not known Thireswar Bordoloi. He further stated that he had signed the will as a witness on being asked by Nasiruddin. He further proceeded to tell as follows:

Benudhar had not signed the will in my presence. I had not seen Thireswar Bordoloi signing the will.

7. In order to prove the execution and attestation of the will it is necessary that the witness should have stated that the testator had signed the will in his presence or that the testator has made personal acknowledgment of his signature to him, and that he (attesting witness) had signed the will in the presence of the testator. It would be seen that Jagannath Barua had not deposed about these facts. On the contrary he had said that Benudhar the Testator had not signed the will in his presence. So the statement of Jagannath Barua did not, in our view, prove the execution and attestation, of the will in accordance with law. The other attesting witness Thireswar was incidentally not examined in the case. The requirement of Section 63 of the Indian Evidence Act was not complied with, The Petitioner had no doubt produced one of the attesting witnesses to prove the execution of the will but the statement of that witness fell short of proving the execution and attestation of the document in question. The Court below was, therefore, correct in holding that the execution and attestation of the document had not been proved. The learned Counsel for the Appellant, however submitted that other witnesses were examined in the case with the view to prove that the testator had made personal acknowledgment of the fact of the execution

of the will. We have gone through the statement of the other witnesses as well and, in our view, none of the other witnesses had proved the attestation and execution of the will. In fact, the attestation of the will could be proved only by examining the attesting witness if he was alive. Jagannath Barua was one of the attesting witnesses. He was alive on the date of the evidence and was in fact examined as P. W. I. The other attesting Witnesses, pointed out herein above was not produced. The execution of the document was hence not proved in accordance with the provisions of Section 68 of the Indian Evidence Act read with Section 63 of the Indian Succession Act.

8. The learned Counsel for the Petitioner however submitted that the personal acknowledgment of execution of the will need not necessarily be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator and in support of his contention he referred to a full Bench decision of Ganshamdoss Narayandoss Vs. Gulab Bi Bai, There can hardly be a quarrel to the proposition that a personal acknowledgment need not necessarily be made by express words. It may be done by other methods also but the personal acknowledgment referred to in Section 63 is to be made to the attesting witness when the latter is required to attest the document as a witness. In the case before us, no evidence was adduced to show that the testator had made any personal acknowledgment of the execution of the will to be attesting witnesses, when they were required to put their signatures or mark on the document in question as witnesses.

9. For the foregoing reasons, we find no merits in this appeal.

10. The appeal is accordingly dismissed. However, in the circumstances of the case. we make no order as to costs.