
(2000) 03 CAL CK 0056
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Appeal from Order No. 737 of 1998 Matter No. 8 of 1992

Sri Dinendra Kumar Bose

APPELLANT

Vs

Sri Tapan Kumar Bose and Others

RESPONDENT

Date of Decision : 31-03-2000

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 30
Succession Act, 1925 — Section 2

Citation : (2000) 3 CALLT 249 : 104 CWN 656 : (2000) 3 RCR(Criminal) 292

Hon'ble Judges : Vinod Kumar, J; Malay Kumar Basu, J

Bench : Division Bench

Judgement

V.K. Gupta. J.

1. This Appeal is directed against a Judgment dated 13th May, 1998 passed by the learned single Judge of this Court whereby the application for grant of Probate of a Will filed by the Appellant was dismissed. Brief facts leading to the filing of the appeal are that one Nirmal Nalini Dassi who had been residing at No. 35A, Dr. Rajendra Road, Calcutta-20 made a Will on 11th November, 1983 and a Deed of Codicil. The said Nirmal Nalini Dassi bequeathed all her Immovable property to Dwijendra Kumar Basu and Dlpundra Kumar Basu in equal shares and declared that they both will become the owners of all her property in absolute right. Nirmal Nalini Dassi claimed to be the sole owner of the immovable property being House at No. 35/C, Dr. Rajendra Road, Calcutta. This property is at the centre of controversy between the parties. After the death of Nirmal Nalini Dassi on or about 28th May 1986, Dlnendra Kumar Bose claiming to be the sole executor under the aforesaid Will dated 11th November, 1983 filed an application for taking out probate in respect of the said Will. In this proceedings the Respondents filed Caveat supported by the Affidavit of Tapan Kumar Bose in which inter alia it was alleged that Nirmal Nalini Dassi did not have the title to the property in question and she could not make Will in respect thereto and therefore the probate proceedings be dismissed and the Court should refuse to

grant any probate in respect of the applicant Dinendra Kumar Bose. The reason advanced in the Caveat and the Affidavit was that Nirmal Nalini Dassi did not have any title to the property since she was not the owner of the property at all inasmuch as the property was given to her by way of a limited ownership during her life time as per the Will executed by her husband Upendra Nath Bose on 17th June, 1924. It was alleged by the Respondents that on 17th June, 1924 Upendra Nath Bose, the husband of Nirmal Nalini Dassi by appointing her as the executrix given to her the said property for a limited purpose, meaning thereby only during her life time and that after her life the property would devolve upon the nephews of Upendra Nath Bose. The relevant part of the Will of Upendra Nath Bose on which reliance was placed by the respondents reads as under :

"I give devise and bequeath my said house and my Government Promissory Notes and Shares which may remain after meeting my funeral and testamentary expenses aforesaid and my other moveables to my wife Srimati Nirmal Nalini Dassi for her life only, that is to say, she shall be entitled to enjoy the Income and profits of the whole of my Estate and house or enjoy the moveables during the period of her life only, but shall not be entitled to transfer or alienate my estate including the movables or any part thereof, and after the death of my said wife my nephews Anil Kumar Bose son of my eldest brother Dwarka Nath Bose deceased, Amarendra Nath Bose son of my third brother Surendra Nath Bose and Rabindra Nath Bose son of my youngest brother Hira Lal Bose or the survivor or survivors and they shall get the whole of my estate moveable and immovable in equal shares absolutely. My said wife is to get a life interest only in my said properties as stated above after my death, provided she ordinarily resides in my said house and premises which have been allotted to me as aforesaid or live under the protection of the members of the family of which I am now a member and my wife shall keep my said house and premises in a proper state of repairs during the period of her enjoyment....."

2. The following observations made by the trial Judge led to the dismissal of the application for probate :

"Lastly the propounder wanted to say by citing a judgment that probate Court has no power to go into the question of title. This question too, according to me, is a futile attempt to resist the contention of the caveator. It is to be noted that probate Court may or may not go into the question of title but always entitle to enquire as to the testamentary capacity of the testator mentally, physically or legally. This is the case where the legal testamentary capacity is a question before the Court of law and the Court is duty bound to pronounce its judgment to that effect otherwise such question will lead to an absurdity and in that case a testator by virtue of his or her will can be able to bequeath any property even if the same is not belong him or her."

3. Two questions emerge and arise for consideration in this appeal. One as to whether In Proceedings for grant of probate it is open to the trial Judge to go into the question of title of the testatrix, and secondly did the testatrix in the

present case have the title to the property in question.

4. Probate has been defined in section 2 of the Indian Succession Act as under :--

"Probate" means the copy of a Will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the Testator."

The Will in the same section has been defined as under :

"Will" means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death."

5. Section 30 of the Hindu Succession Act 1956 reads as under :--

"Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus."

6. Mr. P. K. Roy, learned Advocate for the Appellant submitted that it was not open to the trial Court at all to go into any question relating to the title of the testatrix and that the trial Court while proceeding to consider application for grant of probate should have confined itself only to find out facts with regard to the testamentary capacity, physical or mental, of the testatrix at the time of the execution of the Will and to decide whether she was capable of executing the Will at all or not. Mr. Ray has contended that by going into the question of title the trial Court has committed an error in law. He has referred to the following Judgments in support of his arguments :

1. Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, ,

2. Sm. Panna Banerjee and Others Vs. Kali Kinkor Ganguli, ,

3. (1987) Vol. 2 CHN 63.

7. With regard to the question of the title Mr. Roy submitted that in terms of section 14 of the Hindu Succession Act, 1956 Nirmal Nalin Dassi in any case had the title to bequeath the property through the aforesaid Will. Section 14 of the Hindu Succession Act reads thus :--

"14. Property of a female Hindu to be her absolute property.--(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.--In this sub-section "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance. or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own

skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section(1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, Will or other instrument or the decree, order of award prescribe a restricted estate in such property,"

8. The learned Advocate appearing for the Respondents has, on the other hand submitted that it is not only open but mandatory for the Court seized of probate proceedings to inquire into and find out as to whether testatrix had the title 16 the property in question because if the Testatrix did not have the title, she could not bequeath her property. In so far as the present case is concerned, according to him, Nirmal Nalinl Dassi, the testatrix did not have the title to the property because the original owner of the property namely her husband Upendra Nath Bose had conveyed to her the property In a restricted manner, meaning the property was conveyed to her only for her life time and that after her death the nephews of Upendra Nath Dose were to inherit the property after his death. Mr. Mitra has relied upon following reported Judgments In support of his aforesaid submission :

1. (1997) 3 SCC,
2. Gumpha (Smt) and Others Vs. Jaibai,
3. Shoilesh Chandra Mustafi Vs. Amal Chandra Mustafi and Another, .

9. Let us first deal with the question relating to the testamentary capacity of the Testatrix at the time of execution of the Will by her and this alone being a relevant question to be decided in proceedings for grant of probate by a Court seized of such matter. According to us in an application for grant of probate, it is not open to a trial Court to go Into any question relating to a title. Whether the Testatrix had the title to the property or not basically is a question to be decided by a Civil Court seized of proceedings relating to the adjudication of a civil dispute between two sets of adverse parties, one set claiming title and the other denying or repudiating the same. One such method of doing so is the filing of the Civil Suit in a Civil Court. A Civil Court seized of a Civil Suit is fully entitled and capable of going into all simple and intricate questions relating to the title in respect of the property, whether possessed by the Testatrix or not, with all its effects and consequences, in the light of the Will executed by the Testatrix. The position however is different when one comes to the probate proceedings because the grant of probate in respect of the will of a deceased by itself is not any adjudication by the Court with regard to any question relating to the title as the grant of probate by itself does not confer any right or title upon any person in respect of any property since all such questions are subject to adjudication by an appropriate Civil Court. The scope of probate proceedings is limited only to

decide as to whether the Testatrix at the time of execution of the Will was physically and mentally in such a position and state of mind as to understand that she was executing a particular Will in a particular manner and that the contents of the Will were properly understood by her. If the Court seized of probate proceedings is satisfied about such testamentary capacity of the Testatrix, it shall not go into any further question and grant probate of the Will. What follows thereafter, when the Will is being put to action or might be administered is not a matter for consideration of the Court seized of Probate Proceedings. If a person asserts his right based on a Will for which the Probate has been granted and if the other disputes such a right, the same would form the subject matter of an adjudication by a Civil Court in Civil Suit. When we talk of testamentary capacity, surely it does not include the title of the Testatrix in the property in question as such but only it relates to the capacity of the Testatrix, physically and mentally, at the time of execution of the Will.

For what we have said therefore, we are firmly of the view that the learned Court below went wrong in holding that the propounder was not entitled to get the Probate of the Will and on that ground dismissing the application for grant of probate.

The appeal accordingly is allowed. The Judgment under Appeal is set aside. It is directed that probate in respect of the Will in question shall be granted as prayed for.

No order as to costs.

Later :

Let a xerox copy of this Judgment duly countersigned by the Assistant Registrar of this Court, be given to the parties upon their undertaking to apply for and obtain certified copy of the same on usual undertaking.

M.K. Basu, J.

10. I agree.

11. Appeal allowed