(2003) 08 GAU CK 0027

Gauhati High Court

Case No: First Appeal No. 39 of 1995

Jayanti Gogoi and Others		APPELLANT
	Vs	
Pranati Duara and Others		RESPONDENT

Date of Decision: Aug. 21, 2003

Acts Referred:

- Evidence Act, 1872 - Section 45, 47, 68, 69, 73

Citation: AIR 2004 Guw 23 : (2003) 3 GLR 620 : (2005) GLT 473 Supp

Hon'ble Judges: I.A. Ansari, J

Bench: Single Bench

Advocate: K.K. Mahanta, for the Appellant; T.J. Phukan, for the Respondent

Final Decision: Dismissed

Judgement

I.A. Ansari, J.
This appeal has arisen out of judgment and decree, dated 17.9.1994, passed by the learned District Judge, Nagaon, in Title Suit No. 04 of 1992, whereby the plaintiff''s suit was dismissed on contest with costs.

2. In a nutshell, the case of the plaintiff appellants reads as follows :

On 18.2.1931, Ambikeswar Phukan, a mauzadar, executed a will (Ext, 2) bequeathing his properties mentioned in the will to Smt. Labanya Prava Gogol, who was also named as executor of the will. The testator, namely, Ambikeswar Phukan died as far back as on 22.10.1933. The executor, namely, Smt. Labanya Prava Gogoi filed an application seeking probate of the will as late as on 30.7.73, i.e., after 40 years of the death of the testator. This application was, in course of time, registered as Misc. (Probate) Case No. 10/1973. This application was renumbered as T.S. 10/73 and the same was contested by the respondents. During pendency of the said suit, the executor aforementioned died. The suit, was accordingly dismissed by order, dated 25.7.1978. Long 13 years thereafter, the predecessor-in-interest of the present appellants, namely, Suresh Gogoi, who was the only heir of deceased Smt. Labanya

Prava Gogoi aforementioned, filed another application, on 11.4.1991, seeking letter of administration in respect of the said will. This application came to be numbered as Misc. LA Case No. 70/91 and the same was, latter on, renumbered as T.S. 04/1992 and contested by the present respondents. The applicant, Suresh Gogoi, claimed that he, being the only heir of the said executor and beneficiary of the will, is entitled to letter of administration as sought for by him.

3. The respondents contested the suit by filing their written statement, wherein it was contended, inter-alia, that there was no cause of action for the suit, the suit was not maintainable, the suit was time barred and also barred by res judicata, the case of the respondents being, in brief, thus : Ext. 2 was never executed by the alleged testator, Ambikeswar Phukan, and that the said will was a forged document. Deceased Smt. Labanya Prava Gogoi aforementioned was not the daughter of the said testator and she could not have been legatee of his will.

4. Following issues were framed in the suit for determination :-

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

2. Is the suit maintainable ?

3. Whether the suit is time barred ?

4. Whether the suit is barred by res judicata ?

5. Whether the suit is barred by Order 22, Rule 9(1) CPC ?

6. Whether writings annexed to the petition is the last will and testament of Ambikeswar Phukan as claimed by the plaintiff?

7. Whether Smt. Labanya Prava Gogoi was a daughter of late Ambikeswar Phukan and whether Ambikeswar Phukan appointed her as executor and legatee of his will ?

8. Whether the plaintiff is entitled to the grant of letters of Administration as prayed for ?

5. In support of his case, the plaintiff examined as many as five witnesses. The defendants-respondents also adduced evidence by examining one witness.

6. Upon hearing, learned trial Court answered all the issues except the issue Nos. 6, 7 and 8 in favour of the plaintiff. As a result thereof, the suit was dismissed and the impugned decree followed.

7. I have perused the materials on record including the impugned judgment and decree. I have heard Mr. KK Mahanta, learned counsel appearing on behalf of the plaintiff-appellants and Mr. T.J. Phukan, learned counsel for the opposite party-respondents.

8. It has been submitted, on behalf of the appellants, that the learned trial Court misread and misconstrued the relevant pieces of the evidence on record inasmuch

as the evidence on record convincingly proved that the will, in question, was executed by Ambikeswar Phukan, the said will having been written by Bhadraswar Das (since deceased) and the same having been signed by two attesting witnesses, namely, Harendra Nath Burargohain (since deceased) and Baputi Sharma (since deceased). It is also submitted, on behalf of the appellants, that on an erroneous view taken by the learned trail Court, the learned trial Court disbelieved the evidence of P.W.- Nos. 2, 3 and 4 and in consequence thereof, it held that the execution of the will by the testator aforementioned had not been proved. This finding of the learned trial Court, according to Mr. Mahanta, is against the weight of the evidence on record and the law relevant thereto.

9. Controverting the above submissions made on behalf of the appellants, Mr. Phukan has submitted that the evidence on record is grossly inadequate to prove the execution of the said will by the testator aforementioned and the learned trial Court committed no error of law in dismissing the suit.

10. Before entering into the merit of the present appeal, it is pertinent to note that u/s 63 of the Indian Succession Act, a will is required to be compulsorily attested by, at least, two witnesses. How to prove the execution of will has been succinctly laid down by the Apex Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, wherein the Apex Court has held as follows :-

"The party propounding a will or otherwise making a claim under a will, is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions, which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting and for proving such a handwriting under Sections 45 and 47 of the Act, the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Thus, the question as to whether the will set up by the propounder is proved to be the last will of the testastor has to be decided in the light of these provisions. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes will from other documents. Unlike other documents, the will speaks from the deaths of the testator and so, when it is propounded or produced before a Court, the testator, who has already departed the world, cannot say whether it is his will or not, and this aspect naturally introduces as elements of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills, the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the documents of his own free will. Ordinarily, when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator''s mind and his signature and required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated." (emphasis is added)

11. From a careful reading of what has been laid down in HV Yenga (supra), it is clear that so far as the handwriting and/or signature of a testator or of an attesting witness, dead or alive, is concerned, the mode of proof thereof is same as in the case of any other document. In other words, the handwriting or signature on such a document can be proved in accordance with the provisions of Sections 45 and 47 read with Section 73 of the Evidence Act. u/s 45, the opinion of an expert on the question of identity of handwriting or signature is relevant but such opinion in itself, we may note, is not sufficient proof of the fact that the signature and/or handwritings is of the person by whom it is claimed to have been written or signed. So far as Section 47 is concerned, this Section lays down that the handwriting or signature of a person can be proved with the help of the evidence of the person, who is acquainted with the handwriting of the person by whom it is claimed to have been written or signed. As to who can be said to be acquainted with the handwriting or signature of a person. Explanation to Section 47 lays down that a person can be said to be acquainted with the handwriting or signature of the person, whose handwriting or signature is in dispute, when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. As far as Section 73 is concerned, it empowers the Court to obtain the handwriting or signature of a person present in the Court, whose handwriting or signature on a document is the subject matter of controversy, and compare such specimen handwriting or signature with the handwriting or signature in dispute so as to form its own opinion. In other words, the handwriting or signature of even an attesting witness can be

proved, if he is alive, by taking recourse to Section 73 of the Evidence Act, which empowers the Court to obtain the signature of the witness for the purpose of comparison with the handwriting or signature, which is claimed to have been written or signed by the witness.

12. It is, therefore, clear that the mode of proof of a will under the Evidence Act is same as any other document.

13. What is, however, of paramount importance to note, now, is that a will, as already indicated hereinabove in order to be valid, is required to be attested by, at least, two witnesses and ordinarily, the signatures of not only the testator, but also of the attesting witnesses on the will, in question, have to be proved. Section 68 of the Evidence Act makes it clear that a will cannot be allowed to be used as evidence unless one of the attesting witnesses is called to prove execution thereof. However, what will happen if both the attesting witnesses die or are not found? How can then, such a will be proved? The answer is given by Section 69 of the Evidence Act. In other words, Section 69 deals with the situation, where no attesting witness to a will is found. According to Section 69, if no such attesting witness can be found, it must be proved that the attestation of one attesting witness, at least, is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. It is, therefore, clear that even if the signature of a testator on a will is proved, but the signature of none of the attesting witnesses is proved, the requirements of Section 69 will not be fulfilled and the will has to be treated as not proved.

14. In the case at hand, out of the five witnesses, who have been examined by the plaintiff appellant, the plaintiff, admittedly, examined P.W.- 2 (Purna Chandra Das) and P.W.- 3 (Lakhswar Bora) to prove the signature of the scribe of the will and of the testator of the will respectively. For the reasons assigned by the learned trial Court, the learned trial Court has completely disbelieved the evidence of both these witnesses. However, even if, for a moment, it is assumed that the evidence of P.W.- Nos. 2 and 3 could have been relied upon, the fact remains that no evidence has been adduced by the plaintiff to prove the signature of any of the two attesting witnesses, namely, Harendra Nath Buragohain and Baputi Sharma. In fact, to a pointed query made, in this regard, by this Court, Mr. KK Mahanta reluctantly conceded that the plaintiff had not adduced any evidence to prove the signature of any of the said two attesting witnesses.

15. What logically follows from the above discussion is that the requirements of Section 69 of the Evidence Act was not fulfilled in the present case. It is not in dispute before me that according to Section 69, the plaintiff was required to prove the attestation by, at least, one of the attesting witnesses to the will. Thus, there being not even an iota of evidence on record, which could prove the attestation of the will by the witnesses aforementioned, it could have been legally held by the learned trail Court and was rightly held by it that the plaintiff could not prove the

execution of the will in accordance with law. I see no reason to adopt a view different from the one that has been taken by the learned trail Court.

16. Considering, therefore, the matter in its entirety, I find no merit at all in the present appeal and the same is, therefore, dismissed on contest with costs.

17. Send back the case record with a copy of this judgment and order.