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Calcutta High Court

Case No: Appeal from Original Decree No. 141 of 1985 and Testamentary Suit No. 15 of 1981

Sachi Dulal Saha		APPELLANT
	Vs	
Saraswati Mondal		RESPONDENT

Date of Decision: Feb. 24, 1989

Acts Referred:

- Succession Act, 1925 - Section 264, 63

Citation: (1990) 1 CALLT 33 : 94 CWN 320

Hon'ble Judges: Prabir Kumar Majumdar, J; Abani Mohan Sinha, J

Bench: Division Bench

Advocate: Murari Mohan Das, for the Appellant; Sujit Auddy, for the Respondent

Final Decision: Dismissed

Judgement

Prabir Kumar Majumdar, J.
This is an appeal from judgment and decree, dated 24th August, 1982 passed by a learned Single Judge of this Court on an application of the propounder for a probate of the Will, dated 29th June, 1979 executed by Sushila Bala Saha, mother of the propounder.

2. By this judgment and decree the learned Trial Judge granted probate in favour of the propounder to the said Will and testament of Sushila Bala Saha, dated 29th June, 1979,

3. The said Sushila Bala Saha died on 16th March, 1980. She executed her last Will and Testament in English language and character oil 29th June, 1979 wherein she appointed the propounder Sm. Saraswati Mondal, her daughter, as executrix of the said Will and Testament. Under the said Will the executrix left behind her estate in favour of her daughter Sm. Saraswati Mondal, who is the respondent before us. She is the sole legatee under the said Will. On intestacy the properties left behind by the testatrix would have devolved on Sri Sachi Dulal Saha, the only son, who is the

appellant before us and Sm. Saraswati Mondal, the propounder and Sm. Lakshmi Pramanik, daughters of the testatrix. On citations being issued, the caveat was entered into by the son of the testatrix Sri Sachi Dulal Saha, the appellant. In the affidavit filed in support of the caveat, the appellant contended that the testatrix during her lifetime was under the sole control and dominance of the propounder. He has also disputed the validity and legality of the Will executed on 29th June, 1979. The appellant, by the said affidavit, has also disputed the testamentary capacity of the testatrix, who executed the said Will. The appellant has also taken a point that the property left behind by the testatrix was an undivided half share in the premises No. 5A, Rammohan Saha Lane, Calcutta and according to the terms of settlement filed in another Testamentary Suit No. 8A of 1973 before this Court on 14th September, 1973 a decree was passed in the said testamentary suit recording said terms of settlement whereby the testatrix had only life interest and on her death the appellant would become entitled to the said property. Therefore, according to the appellant the testatrix had no power to dispose of the said property by her said Will and testament.

4. The following issues were raised and settled at the trial:

1. Did Sushila Bala Saha execute a Will on 29.6.79 ?

2. Did she have testamentary capacity to execute the Will ?

3. Was the Will procured by undue influence?

4. To what relief, if any, the propounder is entitled?

5. The learned Trial Judge has held that the propounder has proved due execution of the said Will and testament dated 29th June, 1979 and also proved that the testatrix had the testamentary capacity to make the said Will and testament and was of sound and disposing state of mind, As stated above, the learned Judge granted probate in favour of the propounder as prayed for.

6. The learned Advocate appearing for the appellant has submitted that in view of the terms of settlement filed in the said testamentary suit No. 8A of 1973 the testatrix had only the limited interest in the said property, viz., life interest and after her death the said property would devolve absolutely on the caveator. Therefore, according to the learned Advocate appearing for the appellant, the testatrix was not in a position to dispose of her undivided interest in the property in question being premises No. 5A, Ram Mohan Saha Lane, Calcutta in favour of her daughter, the respondent herein.

7. It is alleged that the father of the respondent as also the appellant made a Will in favour of their mother, the testatrix and the testatrix being executrix of the said Will of her husband applied for grant of probate of the said Will executed by her husband and by an order, dated 14th September, 1973 this Court granted probate in favour of the testatrix of the said Will. It was ordered and decreed that the

probate of the Will by the husband of the testatrix with a copy of the said Will be granted and issued to the plaintiff (testatrix) as sole executrix appointed by the said Will. It was also ordered and decreed that the parties had arrived at certain terms of settlement and at the request the same was filed therein and was directed to be kept as of record. The said terms of settlement as annexed to the decree is at page 233 of the Paper Book which, inter alia, provides that the plaintiff shall have life interest in the premises No. 5A, Ram Mohan Saha Lane, Calcutta and possession thereof without power of alienation. It was also recorded, therein that on the death of the plaintiff (the testatrix of the present Will) the said property should vest absolutely and forever in the defendant (the appellant). It was further provided by the said terms of settlement that the plaintiff should execute a deed of settlement in favour of the defendant subject to her right of residence and possession before the issue of probate to the plaintiff. If the defendant was continuing to live in the portion of the premises No. 5A, Ram Mohan Saha Lane, Calcutta, he should pay Rs. 60 per month to the plaintiff by way of maintenance.

8. It is the contention of the learned Advocate for the appellant that in view of such a decree annexing the terms of settlement, the testatrix Shushila Bala Saha could not make the said Will, dated 29th June, 1979 as she had no disposing power of the property being the subject matter of the present Will, dated 29th June, 1979. He has further submitted that this decree not being challenged afterwards nor any appeal being preferred from the said decree, dated 14th September, 1979, the propounder cannot claim probate of the said Will, dated 29th June, 1979 executed by her mother, the testatrix. In support of this contention, learned Advocate for the appellant has cited a decision of this Court in the case of Jagadish Chandra Chakrabarti and Others Vs. Upendra Chandra Chakrabarti and Others It is held by the Division Bench of this Court that the agreement entered into between such interested parties whether before or during the pendency of an application for probate challenging the terms of the Will and consenting to the grant of probate is binding on such parties. The learned Advocate for the appellant has contended that as the said terms of settlement being a part of the decree, dated 14th September, 1973 passed in the said testamentary suit No. 8A of 1973 is binding on the parties and in view of such settlement, the testatrix cannot dispose of the property by any Will or otherwise,

9. The learned Advocate for the appellant has also contended that in any event the propounder has failed to prove the execution of the Will and also failed to prove the testamentary capacity of the testatrix, It has also been contended by the learned Advocate for the appellant that the said Will bore the thumb impression of the testatrix and it would appear from the documents on record that the testatrix was in the habit of signing her name in Bengali. He has also contended that the explanation given by the attesting witnesses as also by the propounder is not acceptable. The learned Advocate for the appellant has, therefore, suggested that these facts gave rise to certain amount of doubt and until the propounder could

dispel such doubt the Probate Court could not grant any probate to the Will in question.

10. The learned Advocate for the respondent has submitted on behalf of the propounder, that the propounder herself was examined and two attesting witnesses were also examined on behalf of the propounder, viz. Bhupendra Nath Mukherjee and Gopal Chandra Sana and it has been contended by the learned Advocate for the respondent that both of them: proved due execution of the Will. It has been further contended by the learned Advocate for the propounder that the witnesses had also given evidence on the soundness of the mind of testatrix and also about her disposing state of mind.

11. Regarding the terms of settlement as also the decree in the said testamentary suit No. 8A of 1973 it has been contended by the learned Advocate for the respondent that by the said decree in the said testamentary suit No. 8A of 1973, the Court granted probate to the said Sushila Bala Saha, testatrix of the present Will to the Will and testament executed by her husband whereby the husband bequeathed his undivided half share in the said premises No. 5A, Ram Mohan Saha Lane, Calcutta in favour of the testatrix. He has also referred to the terms of settlement which were entered into by the parties in course of the said probate proceedings and it was annexed to the said decree passed in the said testamentary suit No. 8A of 1973. As stated above, the said terms of settlement was subject to this condition that the plaintiff (testatrix) would execute a deed of settlement and also the appellant would pay Rs. 60 per month by way of maintenance if he continued to live in that premises. It is also the contention of the learned Advocate that the said terms of settlement was not acted upon fully by the parties to the settlement and in any event that terms of settlement did not affect the probate granted in favour of the testatrix by which she had the undivided half share in the said property being premises No. 5A, Ram Mohan Saha Lane, Calcutta. The learned Counsel for the respondent has also argued that the said Terms of Settlement would regulate the rights of the parties inter se and it is for the parties to enforce such agreement either by filing a suit or by filing an application u/s 302 of the Succession Act. In the present case, as contended by the learned Council for the respondent, the appellant has made an independent application to this Court for enforcement of the said Terms of Settlement and the same was dismissed by this Court.

12. Regarding the execution of the Will and also the testamentary capacity of the testatrix, the propounder has clearly established the due execution of the Will as also the testamentary capacity of the testatrix. The caveator, the appellant before us, has failed to establish any case for undue influence as alleged in support of the caveat and he has also failed to give any contrary evidence as to the due execution of the Will as also the testamentary capacity. The learned Council for the respondent has also pointed out that it is an admitted position that the mother of the propounder, being the testatrix of the present Will, was living with her daughter, the

propounder, from 1978 till'' her death in 1980 and the caveator had no connection whatsoever with his mother and did not look after his mother during this period.

13. In support of his contention that the said Terms of Settlement is no bar to any probate being granted to the present Will, dated June 29, 1979, the learned Council for the respondent has cited a decision of this Court in the case of A.E.G. Carapiet Vs. A.Y. Derderian, . The learned Council for the respondent has referred to paragraph 28 of the Report, where it has been observed by P. B. Mukharji, J (as His Lordship then was), speaking for the Division Bench, that a Court of probate always shies at terms of settlement. A Court of probate is said to be a Court of conscience which is not to be influenced by private arrangements of the parties. Either it grants probate to a Will or it rejects such grant. The Court has to be satisfied in each case whether the Will for which grant of probate is proposed, is truly the Will of the capable testator or not. It has also been observed by the Division Bench in the said case that in England there is a procedure available for making the terms of settlement a rule of Court, but in our country that is not so. The terms of settlement as annexed to the decree, is not a part of the grant of probate or executable as such. We will refer to the said decision in detail later on.

14. The learned Trial Judge has held that it is a well known principle that no probate can be granted by consent of parties or as a result of any settlement. The learned Trial Judge has also found that moreover in terms of the Terms of Settlement filed the caveator did not carry out his part and admitted that he made defaults in payments. The learned Trial Judge has also found that the evidence of the caveator was not corroborated by any other oral or documentary evidence and also that he was not a truthful witness. It has also been found by the learned Trial Judge that the propounder had discharged the onus of proving due execution, attestation and also possession of testamentary capacity by the testatrix and relying on such evidence, the Trial Court was satisfied that the Will was executed by Sushila Bala Saha on June 29, 1979 and that was her last Will and Testament duly executed.

15. We have considered the respective submissions of the parties. It is now well known proposition of law that probate court cannot go into the question of title and it is a function of the probate court to see in the probate proceedings whether the Will has been duly executed, whether the testator at the relevant time was in sound and disposing state of mind and whether the testator had understood the nature and effect of such disposition and put his signature and/or mark to the document at his free will and volition. It is also a settled proposition of law that probate Court cannot, by consent of parties, grant probate or reject the grant of probate. The decision cited by the learned Counsel for the appellant, i.e., in the case of Jagadish Chandra Chakrabarti and Others Vs. Upendra Chandra Chakrabarti and Others does not lend any support to the appellant. It is observed in that case as follows:

"An agreement entered into between such interested parties, whether before or during the pendency of an application for probate, changing the terms of the Will

and consenting to the grant of probate, is binding on such parties. In such a case, if the Probate Court finds on evidence that the Will is valid, it must grant probate of the Will as it stands unmodified by the terms of the agreement but should make the terms of the agreement an annexure to the decree which terms would regulate the rights of the parties inter se. If any of the parties refuses to abide by the terms, the other or others will be entitled to bring a suit against the party in breach or may compel the executors to distribute the estate in accordance with the agreement by filing an application u/s 302 of the Succession Act in cases where that Section applies."

16. The position of law has also been succinctly explained by P. B. Mukharji, J. (as His Lordship then was) in the Carapiet''s case (supra), as follows:

28. A point of probate practice of great importance, however, remains to be disposed of. The learned Counsel for the parties appear to have agreed to certain arrangements for disposal of the estate of the testator. These terms, which are described as terms of settlement, are supposed to be signed by all the interested persons. We are asked to keep these terms on the records of this court. A court of Probate always shies at terms of settlement. A court of Probate is said to be a Court of Conscience which is not to be influenced by private arrangements of the parties. Either it grants probate to a Will or it rejects such grant. For such a Court, it is said, there is no middle path for a happy compromise. The rule of law is stated to be that there can be no probate by consent. Either it is grant or refusal. The Court has to be satisfied in each case whether the Will proposed is truly the Will of a capable testator or not. It is not concerned with any other arrange- ment. It has been said over and over again that there is no such thing as conditional probate or an amended probate. It is either all or nothing. That seems to be sensible enough law.

29. The Court, however, has a way of softening the austerity and rigour of this procedure. The practice of the court has discovered one such way in this regard. In England, such terms of Settlement are allowed to be filed and are made what is said to be a "rule of the court." See In the Estate of Cook (1960) 1 All FR 689, where the court pronounced for the Will in solemn form and the terms of compromise were made a Rule of Court. The testamentary rules and probate practice in this court do not seem to indicate that there is such a procedure available here for making such terms of settlement a rule of the court. But nevertheless, it has formulated a practice, consistently followed, almost without exception, of making the terms if not a rule of the court but a record on the file of the Court. That does not mean that these terms become a part of the grant or refusal of the probate or executable as such. But it only means this that the records of the court will show that the interested parties had arranged to dispose of the property according to such arrangement when it reaches their hands, but then such agreement does not thereby become executable as a decree of court but can only be enforced by independent proceeding or suit in the ordinary way as an agreement. The

procedure so adopted may be justified rationally by suggesting that this gives a certain amount of authenticity and solemnity to the agreement.

. . . .

. . . .

17. Therefore, in our view, the position of law on this question is well settled and we feel that there is no substance in the argument of the learned Counsel for the appellant on this score. Moreover, by the said decree passed by this Court in the said Testamentary Suit No. 8A of 1973, the probate of the said Will of the husband of Sushila Bala Saha, the testatrix of the present Will, was granted and it was decreed further that the parties had arrived at certain terms of settlement and at their request the same was filed therein and was directed to be kept as of records. Therefore, we do not accept this contention of the learned Counsel for the appellant that in view of the said decree annexing the terms of settlement, the said Sushila Bala Saha, the testatrix of the present Will, could not make any disposition of the undivided share at the premises No. 5A, Ram Mohan Saha Lane, Calcutta. In any event, as we have already stated that the Probate Court cannot go into the question of title, the Probate Court is not to be influenced by any agreement of the parties and if the Will was duly executed and the maker of the Will was of sound and disposing state of mind, then the Probate should be granted to that Will. Further, it will also appear from records that for enforcement of such terms of settlement the caveator, being the appellant herein, took steps for enforcement of the said terms of settlement by making an application to this Court and such application was dismissed. This would be evident from the answer to the question put to the caveator (vide, Q. 153).

18. On the question of merits, the learned Judge has found that the propounder had discharged the onus of proving due execution, attestation and also possession of testamentary capacity by the testator. Taking into consideration of the evidence on record, the Trial Court was satisfied that the Will executed by Sushila Bala Saha on 29th June, 1979 was her last Will and testament duly executed by her. It has also been held by the learned Judge that the caveator had not been able to suggest and establish the suspicious circumstances surrounding the execution of the Will. It has also been held by the learned Trial Judge that the propounder was under no obligation to remove such suspicious circumstances.

19. The caveator has taken a point in his affidavit in support of the caveat that the Will was to some extent unnatural inasmuch as the testatrix by her Will and testament, dated 29th June, 1979, bequeathed her entire property in favour of one of the daughter, viz., the propounder, Saraswati Mondal to the exclusion of her only son, the caveator and also the other daughter, Lakshmi Pramanik.

20. It will appear from the Will in question that the testatrix stated in the Will that her son, Sachidulal Saha, the caveator and also the appellant before us, did not look

after her and did not perform his duty as a son to the testatrix and also bore ill-feelings on the testatrix and tried and was still trying to grab her properties in a fraudulent way. The said Will also states that the caveator made the life of the testatrix miserable and compelled her to leave her Calcutta house for the safety of her life and also the said son, Sachidulal Saha, also dragged her in various litigations both civil and criminal and removed ornaments and silver utensils from her iron-safe. These were the grounds which impelled the testatrix to bequeath her property in favour of her youngest daughter, Saraswati Mondal, the respondent herein, to the exclusion of all others in consideration of the fact that since 1968, the said daughter, Saraswati Mondal, looked after her comforts and the testatrix since 1968 till her death lived with her said daughter at her Dum Dum residence. It would also appear from the record that the appellant also did not offer maintenance to the testatrix as he agreed to do so in accordance with the terms of settlement referred to above. It was also the bounded duty as a son to maintain the testatrix which he did not, on the contrary compelled her mother to leave the dwelling house immediately after the death of their father, i.e., the husband of the testatrix.

21. The learned Judge upon consideration of these facts rightly came to the conclusion that there was nothing unnatural in this Will. It is also a settled proposition of law that the probate court cannot dictate the testator as to how he" should dispose of the property nor can the court introduce it own ethics particularly when it was established on record that the Will was prepared on the testator''s free will and the testator had the necessary sound, and disposing state of mind while preparing and executing the Will. In this connection, two Division Bench decisions of this Court may be referred to, one in the case of Ajit Chandra Majumdar Vs. Akhil Chandra Majumdar, and the other in the case of Sm. Chinmoyee Saha Vs. Debendra Lal Saha and Others, .

22. It will also appear from the record that both the attesting witnesses, Phanindra Nath Mukherjee and Gopal Chandra Saha, proved preparation and due execution of the Will. It is also the deposition of Gopal Chandra Saha that at all relevant times the testatrix had sound and disposing state of mind and she prepared the said Will out of her free will.

23. The appellant had also urged before the Trial Court, and also before us, that the thumb impression given on the Will was not that of the testatrix. The learned Judge held, and in our view rightly, that there was no evidence on record to indicate that the thumb impression put on the Will was not that of the testatrix. It is the evidence of the attesting witnesses Phanindra Nath Mukherjee that as her hand was not in good order he had asked her to fix the thumb impression (q. 8-10). Moreover, Section 63(a) of Indian Succession Act, provides that the testator can sign or affix his mark. Even if the testator is capable of writing but on account of weakness he is unable to put his signature, he can execute the Will by affixing a mark. Such thumb impression is held to be good.

24. It will also appear from records that the appellant also did not adduce any contrary evidence as to the testamentary capacity of the testatrix. In our view, mere suggestion of lack of any testamentary capacity will not be sufficient to hold that there was no testamentary capacity. The person, who has alleged that there is no necessary testamentary capacity, should also establish that case. The appellant also failed to lead any evidence on undue influence and, as we have stated earlier, the learned Judge had commented in the judgment about the evidence of the appellant and it was the impression of the learned Trial Judge that he was not a witness of truth and his evidence about the illness of his mother was not supported by any document nor could he substantiate the charge of undue influence alleged to have been exercised by the propounder for the purpose of procurement of the Will.

25. There was a faint suggestion also on behalf of the appellant that in certain criminal proceedings the testatrix prayed for adjournment on the ground that she was suffering from hyper tension and she had high blood pressure and adjournment was granted in such a proceedings as prayed for. But nothing appears on record as to the fact that she was having such a state of health. The appellant, however, made an application in this proceeding for adducing additional evidence under Order 41 Rule 27. In this application, the appellant has prayed for a direction upon the Criminal Court to produce the records which would show that the testatrix had asked for adjournment on the ground of such illness. We are not inclined to allow such an application at this appeal stage. This very application could have been made before the Trial Court for necessary direction. But the appellant did not choose to make such an application or prayer before the learned Trial Judge. There is only the oral testimony of the appellant in support of his alleged case stated in his affidavit in support of the caveat. It will also appear that the appellant did not call any other witness to prove his allegations contained in his affidavit in support of the caveat. At one stage, he suggested that he would call the physician, who treated the testatrix. But for some reasons or other he refrained from calling such witness or any other witness to depose about the health of the testatrix.

26. We consider that the learned Judge having considered the evidence on record has come to the right conclusion and we do not see any reason to interfere with the findings arrived at by the learned Trial Judge.

27. In the premises, we affirm the judgment and decree passed by the learned Trial Judge.

28. The appeal therefore fails and is hereby dismissed with costs.

Abani Mohan Sinha, J.

29. I agree.