(1969) 07 CAL CK 0001

Calcutta High Court

Case No: Appeal from Original Decree No. 382 of 1959 (Probate)

Sm. Bijanlata Mukhopadhyaya		APPELLANT
	Vs	
Bibhuti Bhusan Mukhopadhyaya and Others		RESPONDENT

Date of Decision: July 11, 1969

Citation: 74 CWN 290

Hon'ble Judges: C.N. Laik, J; A.K. Sinha, J

Bench: Division Bench

Advocate: A.K. Mitra and S.K. Kar, for the Appellant; A.D. Mukherjee, S.K. Bhattacharyya, Ajit Banerjee and Amiya Narayan Mukherjee, for the Respondent

Final Decision: Allowed

Judgement

A.K. Sinha, J.

This appeal is preferred by the only daughter of the testator against the judgment and decree passed by the Additional District Judge, Howrah, granting probate of a Will, with the copy of the Will annexed, to the only son of the testator-respondent No. 1. The instant proceeding originated in a petition filed by the son in which the relevant facts as set out are as follows: One Satish Chandra Bandopadhyaya, since deceased, who was a Hindu governed by the Dayabhaga School of Hindu Law, having his permanent place of abode at No. 277A, Circular Road, Sibpur, within P.S. Sibpur, District Howrah, died on September 9, 1956 from an attack of appoplexy. He left behind him a Will duly executed and attested by him on April 28, 1955 wherein he made a bequest of considerable immovable properties, some in favour of his only son and some in favour of his three grand sons and also a little portion in favour of his only daughter. This Will was his first and the last Will. By this Will, the testator also appointed the petitioner as the sole executor. The testator also left behind him surviving by his widow Sm. Nanibala Debi, his only son Bibhuti Bhusan Bandopadhyaya, only daughter Sm. Bijanlata Mukhopadhyaya (Married) and three grand sons Biswanath Bandopadhyaya, Baidyanath Bandopadhyaya and Lokenath

Bandopadhyaya as also three sons of said married daughter. The properties, both movable and immovable, were valued in all for Rs. 1988-3-9 p. and Rs. 6,6937.15.3 p respectively and described in the schedule to the petition as also affidavit of assets. No application for probate or succession certificate of letters-of-administration in respect of the movable or the immovable properties of the deceased was filed in any other court or pending in any court. There was also no legal bar to the grant of the probate to the petitioner who was entitled to the grant of probate as the sole executor. The only daughter Bijanlata opposed the grant. She filed written statement setting out her objections against the grant of probate. Her case, inter alia, was that the Will was not a genuine Will and not legally and validly executed. Her specific case also was that the Will was created on blank papers signed by the testator and also after obtaining the signatures of her husband Chunilal Mukherjee and one of her sons Basanta Mukherjee collusively by the only son, respondent No. 1. It was also alleged that the testator had no mental capacity or sound disposing mind to execute the Will. Alternatively, it was alleged that Bibhuti Bhusan Bandopadhyaya, the son of the testator got the Will executed by exercising undue influence and coercion upon the testator who was a tool in his hand sometime prior to the date of his death. Thus, the proceeding became a contentious one and the following issues were framed by the trial court:
(1) Is the Will a genuine document?

(2) Was the alleged Will duly executed and attested?

(3) Was the testator of sound disposing mind and understanding and had he testamentary capacity at the time when the alleged Will is purported to have been executed;

(4) Was the testator invalid both in body and mind for several years before his death? and was he during that period completely under the influence and thumb of the plaintiff? Was the alleged Will executed by the testator as a free agent?

2. The trial court on the first and the second issues held the Will a genuine one and it was duly executed and attested. On the third issue it took the view that the testator had sound disposing mind and had testamentary capacity to execute the Will. It also held on the fourth issue that there was no undue influence exercised upon the testator by the respondent No. 1 or anybody else and the testator executed the Will as a free agent. That is, in short, how the appellant felt aggrieved and preferred the present appeal.

3. In the appeal before us, the entire matter is open. So, the identical questions covered by the aforesaid all the issues, namely, (1) whether the Will is genuine, (II) whether the Will was duly executed and attested, (III) whether the testator had testamentary capacity and was of sound disposing mind to execute the Will and (IV) whether the Will was the result of exercise of undue influence and coercion by the respondent No. 1, arise for our determination.

4. Mr. Mitra, on behalf of the appellant challenged the correctness of the findings of the trial court on the ground that the Will was not a genuine document. In support of his broad point, in the first place, he contended that the wife of the testator had been deprived altogether from the properties left by him. Even, it- was said that no provision for maintenance or residence has been made. There is also not a whisper in the Will as to why the wife was so deprived. In support of his contention Mr. Mitra relied on two decisions of the Supreme Court reported in (1) AIR 1959 SC 444 at page 452 (H. Venkatachala v. B.N. Thimmajamma) and also (2) Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, and contended that the deprivation of the wife from the properties of the testator by itself will show that the Will was so unnatural as to create suspicion against the genuineness of the document. Mr. Mukherjee on behalf of the respondent No. 1 sought to meet this point on an argument that the fact that there was no mention of the wife in the Will and that there was no bequest in her favour or any provision even for her maintenance or residence by itself would not tend to prove that the Will was not a genuine document, if otherwise it is proved as a genuine one by showing that this document was validly executed by the testator and attested by all the attesting witnesses. What we find is that the trial court considered this question quite differently under issue No. 4 that is, whether the testator had any testamentary capacity at the time of the alleged Will. In our opinion, this was not a proper approach to the question. Then again, even in dealing with this aspect of the matter under this issue, it appears that the trial court relied on the evidence of two attesting witnesses who in their turn were alleged to have heard from the testator himself that his wife was suffering and had no hope of life, and, therefore, it was not necessary to make provisions for her in the Will. Nanibala, herself was not examined in this case. The trial court, however, found that she did not enter any appearance or file any objection. But, it appears from the record that the copy of the notice of citation which was issued to her was accepted by one of her grandsons (son of respondent No. 1). It is not known whether that copy at all reached Nanibala. But, it appears that the trial court overlooked this very vital aspect of the matter. The trial court, however, relied on the evidence of these witnesses and accepted them as a sufficient ground for not making any provision by the testator under the Will. But, the fact remains that Nanibala was very much alive at the date of the hearing of this matter and she is still alive. We do not think that the statements made by these witnesses were sufficient for concluding that even in the absence of any bequest or any provision even for maintenance and residence of Nanibala the Will, still, became quite natural. Even so, we are not giving our final opinion in this matter since it appears that this question has not been approached by the trial court from proper perspective. The entire matter should have been decided with reference to the first issue, namely, whether the Will was a genuine document or not. This, according to us, is a highly suspicious circumstance which goes very much against the genuineness of the Will and this can be done only on a proper consideration of the entire matter.

5. Mr. Mitra, in the second place, contended that the bequests even to the daughter, the present appellant at two stages in the Will, were all illusory. The first bequest of five cottahs was from a property comprising five bighas of land and this area of five cottahs out of such five bighas was not at all demarcated or defined. The other ten cottahs of land, according to Mr. Mitra, in respect of another holding was a tenanted land and, therefore, there cannot be any question of khas-possession of these lands although the petitioner''s case is that the daughter wanted fifteen cottahs of land for building her residential house. Mr. Mitra also submitted that admittedly, the testator''s daughter was married to a rich man Chunilal Mukherjee who is alleged to have been an attesting witness to the Will. He has a palatial building at Mahestala. Then, why such a daughter, so well-placed in life, should ask from the testator a small quantity of land of about 15 cottahs for building her residential house ? This, according to Mr. Mitra, also is a highly suspicious circumstance. These sorts of bequests were provided in the Will just to keep up an appearance of its genuineness. So, according to Mr. Mitra, this type of bequest also goes to show the suspicious nature of the Will. Mr. Mukherjee, however, sought to repel these contentions on an argument that these were questions of details. Whether the land could be identified or whether the other lands are tenanted lands are matters which could be successfully fought out by the daughter for getting the properties under the terms of the Will. What we find is that this aspect of the matter has not at all been considered by the trial court. There can be little doubt that prima facie these provisions seem to us to be illusory and unnatural. It really does not stand to reason as to why a daughter married to such a wealthy man should ask her father to give only 15 cottahs of land for building residential houses at a congested place like Shibpur. This really seems to us to be a circumstance which is highly suspicious and the trial court should have considered and decided also this aspect of the matter to come to a proper conclusion as to whether the Will, as propounded, was a genuine document or not.

6. Mr. Mitra, in the third place, contended that the scribe was not examined in this case. The Will is not a hollograph Will of the testator. It was a Will reduced to writing in usual form by another writer. So, the proof as to genuineness of the Will, will very much depend upon the evidence that would be given by the writer. The writer of this Will appears to us to be the testator''s ''Gomosta''. The trial court, it appears, accepted the explanation given by the propounder that as a result of filing certain Account Suits as also criminal cases against this writer, who was dismissed, according to his evidence, about four or five months prior to the date on which this Will was purported to be written by him, he could not be cited as a witness in this case. It appears that the trial court accepted the explanation given by the petitioner Bibhuti Bhusan and it accepted the Will as proved on his evidence to the effect that he knew his hand-writing. As against this, it was contended by Mr. Mitra, firstly, that an employee dismissed sometime about four or five months before the writing of this Will could not have again come and written this document. Secondly, it was said

that there was no document filed by Bibhuti to show that in fact, such criminal proceedings were pending even at the date of hearing. There was also nothing to show as to what happened to the Account Suits which were filed on the 9th November, 1957. According to Mr. Mitra, the entire matter was collusive. The writer who was their employee was purposely kept back on these frivolous pleas from deposing in court. Mr. Mukherjee, however, pointed out to us from the records that this writer Bhagabat Chandra Das was cited as a witness on behalf of the daughter. Even if it is so, all these matters have not been considered at all by the trial court. It cannot be doubted that this writer Bhagabat Chandra Das was one of the most important witnesses and, before the explanation offered by the petitioner could be accepted on the plea of his inability to produce this witness, the trial court should have gone into these matters in details, taking into consideration all the relevant circumstances relating to the absence of this particular witness to prove the Will. It appears that the trial court found also that no witness, however, "saw Bhagabat Chandra Das writing out the Will". If that be so, we think there is no reason why this Bhagabat Chandra Das should not have been directed to appear as a court-witness so that the entire matter could have been clarified by him before the court. But, this also has not been done. In our opinion, the explanation given by Bibhuti Bhusan is not a sufficient excuse for non-production of this witness. We, therefore, think that even this aspect of the matter has also not been properly gone into and decided by the trial court.

In the fourth place, Mr. Mitra contended that it is in evidence of Bibhuti that he came to know the intention of the testator four or five months before the execution of the Will. If that be so, then clearly, there was a proposal by the testator and when there was a proposal, there should have been a draft. It was submitted that a man of testator''s status and standard could not be said to have been in want of lawyers. As a matter of fact, it was pointed out by Mr. Mitra that in a part of that same residential building, a lawyer was residing. The testator was possessed of considerable immovable properties both in Shibpur as also in Abad, District 24-Farganas. It cannot be doubted that in connection with the management of these properties the testator was in constant touch with lawyers. But, it is surprising that while he was disposing of his properties by his last Will and testament, he would not take any advice or have a draft from a lawyer. This, according to Mr. Mitra, is also a circumstance which no doubt creates reasonable suspicion against the genuineness of the Will. Mr. Mukherjee, however, contended that if, in fact, it is proved that such a Will was executed and attested duly, then there was no necessity of any proposal or draft. They are not essential requirements of a valid Will. It is true, they are not. But, nevertheless, their absence will clearly create suspicion in the mind of the court. At any rate in the present case, this aspect of the matter also has not been considered by the trial court. We do not know what arguments were advanced by the respective lawyers of the parties, but from the judgment, there is no indication that such questions were at all gone into. In a matter granting probate of the Will

there is a clear duty cast upon the court to make itself free from any reasonable doubt. So, in order to do that, we think the trial court should have considered this aspect of the matter also.

7. Fifthly, Mr. Mitra argued that although as many as eleven witnesses attested the signatures of the testator, from a look to these signatures it will at once appear that they were squeezed in a short space. It was also pointed out that the word ''Ishadi'' was not in the same hand-writing as that of the writer. Then, again, addresses of most of the witnesses were not given and that is because there was no space left. They had to be accommodated somehow within the short space. So, from the manner and nature of the signature of the attesting witnesses, according to Mr. Mitra, there cannot be any doubt that this Will was a created one. Mr. Mitra also drew our attention to the word "Bhadreswar" against the name of the witness Balailal Chattopadhyaya, and submitted that this word was also not written by the witness himself, and not in the same ink. These matters again, we find, the trial court has not considered at all.

8. Mr. Mitra also pointed out that the Will is un-registered, and on a superficial examination it would appear that it has been written on certain cartridge papers which were old papers and were in use prior to the independence of India. At the material time, according to Mr. Mitra, these papers were not issued at all. Mr. Mukherjee, however, contended firstly that the Will need not be registered and secondly he drew our attention to certain entries in the account-book wherefrom he showed that as many as eight cartridge papers were purchased by the testator and handed over to Bhagabat Chandra Das. But, at the same time, it appears from the subsequent entry on the next day that Bhagabat Chandra Das left for Diamond Harbour with those papers presumably prior to the date of the execution of the Will. If that be so, it is difficult to understand how these cartridge papers on which the impugned Will was written could be explained. As regards the age of the cartridge papers what Mr. Mukherjee wanted to say was that these papers were being sold by the Stamp Collectorate even at the time when the Will was executed. In our opinion, these are very material questions for ascertaining as to whether the Will was genuine or not. But these material questions have also not been gone into by the trial court. Lastly, it was contended by Mr. Mitra that specific case of the petitioner was that the propounder managed to obtain signatures of the defendant''s husband Chunilal Mukherjee and also his son who was then a boy of only 19 years, more or less, and also the signature of his father and created the Will subsequently. For that purpose, he drew our attention to certain cartridge papers which were exhibited in this case bearing signature of the testator along with his Sarkar co-sharers in respect of Abad properties. On this point, the trial court relied mainly on the evidence of nine witnesses who attested the document and also the signature of the husband and son of the appellant and the corrections made by the testator. It also proceeded on the footing that after the partition of Abad properties in 1945 there could not have been any occasion for getting the signature on blank papers from

the testator. We do not think that the trial court made a correct approach to this aspect of the matter also. Mr. Mitra submitted that even after the partition there were Abad properties left in the share of Satish and, naturally, as an old man, as usual he used to make over signed blank papers for purposes connected with the management of these properties. The other blank papers exhibited in this case would only show that the testator was in the habit of signing blank papers. But, it was said by Mr. Mukherjee that there was no reason as to why Chunilal Mukherjee, the husband of the appellant and his son should have signed at the bottom of the last sheet. We think there may be more reasons than one. It is clear from the documentary evidence that there were certain Abad properties in the name of Chunilal Mukherjee as a tenant under the testator who was superior landlord. The trial court posed a question as to why a superior landlord should take signature of a tenant and for what purpose, on blank papers. We think the answer to this question may be given in more than one ways. It is the case of the appellant that her husband or son were benamdars. So, such tenancies, according to her, were fictitious and, naturally, the testator or his son for the purpose of management of these properties standing in the name of the husband of the appellant might very reasonably require certain papers to be signed by them in connection with the management of the properties either by filing suit or for other purposes. Considering all these we think the trial court also failed to make a correct approach to this aspect of the matter. It should not have rejected the theory of creation of the Will on blank papers signed by the testator influenced only by such consideration without, at any rate, considering all the other aspects of the question. The trial court, however, relied on the other point, namely that the two sheets of the Will were corrected and initialed by the testator himself. Here, again, there is a major discrepancy between the evidence of Bibhuti and also the other attesting witnesses. It was pointed out by Mr. Mitra that according to the evidence of Bibhuti, the corrections were all made in the presence of the family members in the morning whereas some of the attesting witnesses said that the corrections were made in the afternoon. That being so, none of the witnesses including the propounder himself could be relied upon. Then again the trial court did not consider the evidence of D.W. 2 Sarojendra Nath Sarkar. He specifically stated that the corrections in the body of the Will (Exts. 2 and 2A) "are not in the handwriting of Satish Banerjee" but was not cross-examined on this point. The evidence of these witnesses should not have been summarily rejected in such manner as has been done by the trial court. In such state of evidence the question whether or not the initials or the writings were made by the testator himself, in our opinion, was not properly decided. Mr. Mitra, however, pointed out that although there is similarity in the ink there was great doubt whether these initials and writings correcting the two pages of the Will by the testator were made by the testator himself. In our opinion, the evidence that has been adduced does not appear to be quite satisfactory. The question should be gone into afresh by the trial court.

9. Another important matter as to whether the testator executed he Will to keep the property in his male line in view of the anticipated enactment of the Hindu Succession Act was also not properly considered, for, we find that it was taken up on issue as to testamentary capacity of the testator. But even there, the question was practically left undecided on the view that no argument was advanced on behalf of either party. The question really is not so much of argument as of court''s duty to consider the degree of probabilities in the facts and circumstances of this case which may reasonably be inferred to determine whether it was really the intention of the testator or the motive operating in the mind of the testator''s son to deprive the daughter by creating such a Will. Necessarily, therefore, this question should have been considered properly on the issue as to genuineness of the Will but this has not been done.

10. A point was also raised by Mr. Mitra that although there were corrections in the Will and over-writings too, covering three pages of the Will, there was no note ''kaifiat'' given by the writer as it is usually done in these types of documents. There is also no signature of the testator at the bottom of the last page of the Will. Mr. Mukherjee frankly conceded that in a document as that of a Will, usually the testator also should sign at the bottom of the last page. But the mere fact that such a signature was not made at the bottom of the last page of the Will will not go to prove that the document was not a genuine document. As regards ''kaifiat'', Mr. Mukherjee contended that it was only necessary for the purpose of registration of a document. It may or may not be so. But the fact remains that the trial court has not considered these questions at all.

11. Then again, it is noticed that although the Will is reduced in writing in conventional form there is significant absence of the recital of the attesting witness at the bottom of the last page that the testator signed in the presence of the witnesses and the witnesses also signed in the presence of the testator. It was argued, however, by Mr. Mukherjee that such omission would not create obstacle or stand in the way of proving the Will as a genuine Will. What we find is that this question has also not been considered by the trial court. We also notice that in the account books (Ext. 3 series) there are certain entries purported to be written by the testator himself on certain dates even after his death. This seems to us to be absurd. But, we do not find anything in the judgment which goes to show that this matter was considered at all. These are circumstances which no doubt create great suspicion relating to the valid execution and attestation of the impugned Will. We also find from the records that there is a great discrepancy of areas given in respect of the immovable properties in the Will with the actual areas as stated in the affidavit of assets. This, again, is a circumstance which goes great way to cast a doubt in the mind of the court against the genuineness of the Will; particularly, in this case when it is in evidence that the testator was a very careful man and managed himself his own properties and looked after also the family affairs including writing out account-books even at the age of eighty years. These

questions, in our opinion, should be seriously considered before a pronouncement can be definitely made by the court declaring that the Will, as propounded, was a genuine Will left by the testator.

12. Mr. Mukherjee on behalf of the respondent No. 1 however, contended that in the present case as many as seven attesting witnesses had come and deposed on behalf of the propounder to prove the Will. There may be certain minor discrepancies, but when so many attesting witnesses have actually testified to the fact of execution by the testator, it will carry presumption in favour of execution and attestation. Reliance was placed on two Bench decisions of this court reported in (3) 20 C.W.N. 193, Brahmadat Tewari v. Chaudan Bibi, and (4) 10 C.L.J. 499, Netai Chand Saha Banikya v. Nagani Dassya, to show that in such circumstances onus will lie on the objector to prove that the Will was not still a genuine Will. We do not think there is any dispute on the proposition of law laid down in those cases. But then, each case has to be judged on its own facts. In this case, it is true that a large number of witnesses came and deposed before the court on behalf of the propounder in proof of execution and attestation of the Will. But, in our opinion, in the facts and circumstances of the present case, the veracity of statements of these witnesses can be effectively tested only on consideration of all the questions already discussed by us and in regard to which there has not been either a proper approach or not considered at all by the trial court. Mr. Mukherjee also relied on a decision of the Supreme Court reported in Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, , to show that even if there were little discrepancies as to the time or place or other things, then also this could not be sufficient cause for declaring the Will as invalid. Here, again, also the principle indicated is undisputed. But the question is to be judged in the light of circumstances revealed in a given case. We have already held that in this case there has not been a proper approach or consideration at all of a number of circumstances which were very material for a decision on the question as to the genuineness of the Will. In our opinion, therefore, the evidence given by these witnesses can be properly weighed only upon a consideration of all the aforesaid matters by the trial court.

13. Considering all these we find that failure of the trial court to make a proper approach and consider above essential matters in the light of relevant circumstances or evidence on the issue as to genuineness of the Will has introduced serious infirmities into its decision. Since the decision on other issues will largely depend upon the first issue, the rest of the judgment cannot also be sustained. Accordingly, this appeal is allowed. We set aside the judgment and decree of the trial court and send back the case on remand for its fresh decision on all issues in accordance with law and in the light of the observations made above on the evidence and materials on record and on further evidence as may be adduced by the parties including the re-calling of the witnesses. We also give liberty to the parties to take opinion of experts to ascertain the age and other particulars of the

cartridge papers on which the Will was written. The costs of this appeal will abide the final result of the suit, hearing fee in this Court being assessed at thirty Gold Mohurs.

C.N. Laik, J.

I agree.