(2011) 12 CAL CK 0046

Calcutta High Court

Case No: F.A. No. 47 of 2008 F.A.T. No. 1704 of 2005

Ranjan Kumar Mitra		APPELLANT
	Vs	
Swapanendra Krishna Deb and Others		RESPONDENT

Date of Decision: Dec. 23, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10A
- Evidence Act, 1872 - Section 73

Citation: (2012) 2 CHN 238

Hon'ble Judges: Tarun Kumar Gupta, J; Subhro Kamal Mukherjee, J

Bench: Division Bench

Advocate: Shyama Prasanna Roy Chowdhury, Mr. Saptangshu Basu, Ms. Ananya Das and Mr. Abhijit Sarkar, for the Appellant; Shaktinath Mukherjee Mr. Shiba Prosad Mukherjee Ms. Debjani Ghosh Mr. Bhaskar Mukherjee, for the Respondent

Judgement

Tarun Kumar Gupta, J.
This appeal is directed against judgment and decree dated March 25, 2005 passed by learned Judge 3rd Bench City Civil Court, Calcutta in O. C. No.13 of 1996. By the impugned judgment learned Trial Court granted probate in respect of the will dated April 19, 1992 executed by one Sudhindra Krishna Deb appointing the plaintiffs as executors.

2. Being aggrieved with said judgment and decree this appeal has been filed by Ranjan Kumar Mitra being substituted Opposite Party No.3 in place of his mother Geeta Rani, since deceased.

3. Respondent No.1 and 2 claiming to be executors of the will dated April 19, 1992 executed by Sudhindra Krishna Deb, filed said case praying for probate of the will. According to them Sri Sudhindra Krishna Deb alias Kumar Sudhindra Krishna Deb executed his last will dated April 19, 1992 bequeathing all his properties, both movable

and immovable, through said will appointing said petitioners as joint executors. Accordingly, there is a prayer for probate of said will.

4. Said probate proceeding was contested by Smt. Ashalata Mitra, Opposite Party No.2 (proforma respondent No.4) and present appellant Ranjan Kumar Mitra, Opposite Party No.3 by filing two separate written statements on affidavits. Their main contentions were as follows:-

Deceased Sudhindra Krishna Deb died on November 5, 1994 as bachelor leaving behind his brother Sailendra Krishna Deb (Opposite Party No.1), Sister Ashalata Mitra (Opposite Party No.2) and sister Geeta Rani Mitra (Opposite Party No.3) as his only legal heirs. The deceased was highly educated and he would not have signed the will knowingly as it was drafted with poor English. The testator had best of relation with his sisters namely Ashalata Mitra and Geeta Rani Mitra and their sons namely Asoke Mitra and Ranjan Mitra. Rather he was not at all in good terms with alleged executors namely Swapanendra and Samirendra being sons of his two pre-deceased elder brothers namely Sourindra and Sudhirendra. The testator was not also very happy with Sandipendra, the son of his younger brother Salilendra. It is quite unbelievable that the testator will bequeath all his properties in favour of his three nephews namely Swapanendra, Samirendra and Sandipendra and his younger brother Salilendra depriving his living sisters namely Ashalata Mitra and Geeta Rani Mitra. The testator lost his mental faculties and was suffering from various ailments for last 8-10 years before his death. In 1992 he was not mentally and physically fit to execute the alleged will knowing its contents. The signatures appearing on the will also did not tally with the admitted signatures of the testator. The beneficiaries as well as attesting witnesses of the will were not in conformity with the liking and taste of the testator. Salilendra, the younger brother of the testator, did not disclose about the alleged will even after death of the testator and rather asserted that there was no will of he testator. Salilendra, on the other hand, tried to pursue their sisters namely Ashalata and Geeta Rani to take some money and to relinquish their claim over the property of testator. As those sisters were not agreeable to said proposition the alleged will was later on produced. It was either obtained on exercise of undue influence or by manufacturing forged signatures of the testator thereupon. The will was clouded with suspicious circumstances and its probate should not be granted.

5. On the basis of the pleadings of the parties learned Trial Court framed the following issues for determination.

1. Had the testator testamentary capacity to execute the Will?

2. Did the testator sign the Will out of his free volition?

3. Is the Will properly attested?

4. Is the Will genuine & valid?

5. Is the applicant entitled to probate of the will?

6. To what relief, if any, is the applicant entitled?

6. Executors examined three witnesses namely Megnath Banerjee (P.W.1), Kamal Krishna Ghosh (P.W.2) and Swapendra Krishna Deb (P.W.3). They also exhibited the will dated April 19, 1992 (Ext.1) and a bunch of letters (Ext.2 series) for the period of 1992 and 1993 alleged to be written to the authority of Metro Railway bearing signatures of testator.

7. The objectors examined four witness namely Ranjan Mitra (D.W.1), Asoke Mitra (D.W.2), Amaresh Sarkar (D.W.3) and Prabir Kumar Moitra (D.W.4). They also exhibited a bunch of letters, envelopes, A/D cards etc. mostly of the years of 60s and 70s which were marked as Ext.A to M.

8. On the basis of evidence on record, both oral and documentary, learned Judge of the Trial Court found that testator had the capacity to execute the will and that the same was executed out of his free volition and that the same was properly attested and proved according to law.

9. Mr. S. P. Roy Chowdhury, learned Senior Advocate for the appellant Opposite Party No.3, has submitted that the alleged signature of the testator appearing on the will does not tally with admitted signatures of the testator and that the same was forged one. According to him, the report of expert (Ext.N) also established the same. He has further submitted that though learned Trial Court did not rely on the report of expert (Ext.N) as expert could not be cross-examined in full by the contesting Opposite Parties, but the report of expert could have been exhibited under Order 26 Rule 10 A of the CPC without examining the expert. According to him, even in the naked eyes it is clear that the alleged signature of testator appearing on the will is not tallying with the admitted signatures of testator (Ext.2 series) and that learned Trial Court failed to exercise the power of the Court in this regard u/s 73 of the Indian Evidence Act.

10. According to Mr. Roy Chowdhury the alleged will was executed on April 19, 1992 and the testator died on November 5, 1994 and that for several years before his death testator was seriously ill and had no mental capacity to execute an important document like will and that he was very much dependent on his youngest brother Salilendra.

11. Sri Roy Chowdhury has further submitted that as per will Swapanendra and Samirendra, the sons of two pre-deceased elder brothers of testator Sudhindra Krishna Deb were made executors, though Sudhindra Krishna Deb had not at all good relation with those nephews and that it is unthinkable that of all persons he would select those two nephews as executors of his will.

12. Sri Roy Chowdhury has further submitted that testator Shdhindra Krishna Deb was very fond of Ranjan Mitra and Asoke Mitra, the sons of his two sisters namely Geeta Rani

and Ashalata, both since deceased, as both Asoke and Ranjan were well placed in life by their dint of merit. The testator was also fond of his youngest brother Salilendra. Had he executed any will he would have appointed any of these persons as his executors and not the present executors. Sri Roy Chowdhury has further submitted that attesting witnesses namely Megnath Banerjee (P.W.1) and Kamal Kumar Ghosh (P.W.2) were also not probable attesting witnesses of the will of the testator as he had not very close relation with them.

13. Sri Roy Chowdhury has next submitted that it was alleged that the alleged will was typed by the testator himself but the testator was a highly educated person and the language of the will did not seem that it was drafted by the testator. Sri Roy Chowdhury has next contended that though it was noted in the will that it was read over and explained but there was no note or evidence as to who read over and explained the will. In this connection he has further submitted that if the will was typed by the testator himself then it was redundant to include the clause of reading over and explaining the will to the testator. Sri Roy Chowdhury has also submitted that in the letter dated July 26, 1995 (Ext.G) written by Salilendra to the lawyer of Opposite Party sister Ashalata Mitra, it was alleged that the will of the testator was found from his almirah opened on March 13, 1995 in presence of some of the family members including Ashalata and Geeta Rani being Opposite Party sisters and that the will was read over to the relations present there and that executors were also present and that a draft was also found.

14. According to Mr. Roy Chowdhury as per evidence of one of the executors namely Swapanendra Krishna Deb he came to know about the will on March 13, 1995 and hence there was discrepancy in between said evidence of Swapanendra (P.W.3) and aforesaid averments of the letter of Salilendra dated July 26, 1995 (Ext.G) which remained unreconciled. According to Mr. Roy Chowdhury all these things taken together go to show that the will was executed under suspicious circumstances and that the will did not bear even the signature of the testator and was a forged one. Mr. Roy Chowdhury has also submitted that though testator had great affection for Ranjan Mitra and Asoke Mitra, sons of his two sisters but he made provision for them in the will for a scanty sum of Rs. 25,000/- each. This also made the will suspicious document.

15. Mr. Roy Chowdhury has submitted that as the alleged will was executed under suspicious circumstances as stated above and the executors failed to remove those suspicious circumstances, learned Trial Court committed great mistake by allowing probate of said will. In support of his aforesaid contention he referred case laws reported in 1964 Supreme Court of 529 (v51 C 67) From Calcutta: Subodh Kumar Banerjee and Others Vs. Soshi Kumar Banerjee and Others, Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, Saraswati Arora & Anr.), Smt. Malkani Vs. Jamadar and Others,), Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others, 2011 (1) CHN (CAL) 194 (Shibani Sadhukhan & Anr. V. Anil Sadhukhan) and H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others,

16. Sri Roy Chowdhury has also referred case laws reported in 2008 (1) CLJ (SC) (Gaudiya Mission v. Shobha Bose & Anr.) and 1996 (1) CHN (Dr. Narayan Mukherjee v. Smt. Krishna Dey) in support of his contention that Court has ample power to compare the disputed signature with admitted signature of a person by invoking Section 73 of the Indian Evidence Act. According to Mr. Roy Chowdhury learned Trial Court failed to take note of those suspicious circumstances and also the fact that the signature appearing on the will was forged one and hence the impugned judgment was liable to be set aside.

17. Mr. Shaktinath Mukherjee, learned Senior Advocate, on the other hand, has submitted that it is true that the signature appearing on the will (Ext.G) seems to differ from the admitted signatures of the testator (Ext. 2 series) even on plain eyes. According to Mr. Mukherjee some difference in signature does not make the signature forged one. Sri Mukherjee has further submitted that when an aged person consciously puts his signature on will knowing the importance of the document, then it is probable that in order to be very conscious to give very good impression of signature the executor''s signature appearing on the will sometimes differs from his other signatures appearing on other documents. But according to him that cannot be said to be forged one. In this connection he refers to the evidence of attesting witnesses namely Megnath Banerjee (P.W.1) and Kamal Kumar Ghosh (P.W.2) wherein those two witnesses categorically stated that executor put his signature on said will in their presence and thereafter they put their respective signatures in presence of executor and other witnesses. No suggestion was even given to them that testator did not put his signature on the will in their presence or that the will bear forged signature of the testator. According to him, only stand taken at the time of cross-examination of those witnesses was that testator was compelled to put his signature through undue influence which was denied. According to him, the case of undue influence was neither proved in the Trial Court nor is pleaded in this appeal. According to Mr. Mukherjee as testator''s putting signature on said will in presence of attesting witnesses was not denied during lengthy cross-examination of the witnesses, there is hardly any scope for taking this stand of having forged signature of the testator on the will.

18. Sri Mukherjee has further submitted that attesting witness Megnath Banerjee (P.W.1) was a friend of testator''s brother Salilendra and was an income tax lawyer and used to work as income tax lawyer of the testator and hence he was the most probable attesting witness of the will. According to Mr. Mukherjee other attesting witnesses, namely Kamal Kumar Ghosh was a practising advocate of City Civil Court under Sunilendra Krishna Deb, another brother of testator, and had acquaintance with the testator and hence his presence as an attesting witness was not at all improbable.

19. According to Mr. Mukherjee, the youngest brother of the testator namely Salilendra Krishna Deb sent a letter dated July 26, 1995 (Ext.G) to the advocate of Opposite Party sister Ashalata Mitra where he specifically stated about finding out of the will of testator on 13.03.1995, reading over its contents in presence of relations including Opposite Party sisters and finding of one drafting was not controverted or denied by the Opposite Parties

by sending any further letter or by any other means. Mr. Mukherjee has further submitted that non-production of the draft will had no bearing in this case as the alleged case of forgery was not at all established and bequeath of property by the testator as per will was most natural and probable. According to Mr. Mukherjee as per the will the beneficiaries were Salilendra, the youngest brother of the testator, Salilendra''s son Sandipendra and two other nephews namely Swapanendra and Samirendra being sons of two other pre-deceased elder brother of testator. According to Mr. Mukherjee, testator used to reside in same mess with Salilendra and his family members together with their mother and this continued even after death of their mother and till the death of testator. Mr. Mukherjee has further submitted that Salilendra and three nephews of the testator had no income other than the income from ancestral properties. On the other hand, Ranjan Mitra and Asoke Mitra being sons of two sisters of the testator were well placed in life. One was a chartered accountant having good service in an office and the other was an I.A.S. officer. In other words both Asoke and Ranjan were well off. Mr. Mukherjee has submitted that testator being a member of old Zamindary family having Zamindary mentality rightly selected his younger brother with whom he was most close and his three nephews who were after all members of their family, for being beneficiaries of his will. According to Mr. Mukherjee there was no suspicious circumstances in executing the will and that the will was executed by the testator in presence of attesting witnesses on his own volition according to law and that the instant appeal was liable to be dismissed.

20. There is no denial that testator Sudhindra Krishna Deb used to reside with his younger brother Salilendra in a joint mess during life time of his mother and also after death of his mother. It is obvious that Sudhindra Krishna Deb will have very soft corner for Salilendra and his son Sandipendra. The testator died bachelor and had shares in various immovable properties including Shyambazar market. As per will in question he bequeathed most of his properties in favour of his youngest brother Salilendra and remaining portion of his property to his nephews namely Sandipendra, Swapanendra and Samirendra, being the sons of his brothers. It came out that sons of his two sisters namely Asoke Mitra and Ranjan Mitra were well placed in life and were not in need of any financial assistance from the testator through will. In perspective of the above giving only Rs.25,000/- each to Asoke and Ranjan by testator in his will do not seem to be improbable.

21. Both the attesting witnesses claimed to have acquaintance with the testator. Meghnath Banerjee (P.W.1) claimed to be a friend of testator''s younger brother Sailendra Krishna Deb and also income tax lawyer of the testator. Another attesting witnesses Kamal Kumar Ghosh claimed to be junior of testator''s lawyer brother Sunilendra Krishna Deb and having acquaintance with testator. These facts could not be denied by the contesting Opposite Parties.

22. We do not find any improbability in selecting those two persons as attesting witnesses in the will of the testator.

23. Though much argument was made on the allegation of having forged signatures of testator on the will but no suggestion whatsoever to that effect was given to the attesting witnesses who claimed to see the testator to put his signature on the will in their presence. During evidence of those two witnesses a stand was taken that testator''s signature was obtained thereupon by undue influence. This stand, on the other hand, proves having signature of testator on the document. However, said suggestions were denied and said stand was not taken during appeal hearing.

24. There is no denial that a Court of law, be it Trial Court or the Appeal Court, has the authority to compare the disputed signature of a person with his admitted signatures u/s 73 of the Indian Evidence Act. By invoking Section 73 of the Indian Evidence Act we have examined the disputed signature appearing on the will with the admitted signatures of testator namely Ext.2 series. It is true that there were some differences in those signatures but that does not mean that the signature appearing on the will was forged one. If a person is bent on forging the signature on a document like will, he will forge the said signature at least in such a manner so that it cannot be differentiated with admitted signature in naked eyes. We find much force in the aforesaid submission of Mr. Mukherjee that when an aged educated person wants to put his signature on an important document like will, he becomes over conscious and that in the process his signature may vary from his other admitted signatures. There is no concrete evidence to show that testator was suffering from illness so that he had no mental capacity to execute the will in 1992. It is true that there were some discrepancies in the evidence of witnesses but those discrepancies were not sufficient to discard the entire evidence of these witnesses.

25. The case laws as referred by Mr. Roy Chowdhury lay down the settled proposition of law regarding manner of proof of will in normal circumstances as well as under suspicious circumstances, the power of Court u/s 73 of the Indian Evidence Act and the importance to be given to the report of hand writing expert. Above proposition of law as laid down by those case laws are not disputed. However, those case laws are not found to be of much help to the appellant as it came out from evidence on record, both oral and documentary, that the testator executed the will in question on his own volition after knowing its contents.

26. Accordingly, we find and hold that there is no scope for interference with the impugned order of granting of probate.

27. As a result, the appeal fails. However, we pass no order as to costs.

28. Urgent photostat certified copy of this judgment be supplied to the learned Counsels of the parties, if applied for.

Subhro Kamal Mukherjee, J.

28. I agree