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(1982) 01 CAL CK 0003

Calcutta High Court

Case No: A.O.D. No. 479 of 1974

Golok Chandra Bera		APPELLANT
	Vs	
Golapi Bewa and Others		RESPONDENT

Date of Decision: Jan. 28, 1982

Acts Referred:

- Evidence Act, 1872 - Section 14(1), 50

Citation: 86 CWN 783

Hon'ble Judges: P.K. Banerjee, J; B.N. Maitra, J

Bench: Division Bench

Advocate: Robin Mitra, J.K. Banerjee and Tapas Kr. Mukherjee, for the Appellant; Saktinath Mukherjee and Mrinal Kanti Roy, for the Respondent

Final Decision: Dismissed

Judgement

B.N. Maitra, J.

The present application for grant of a probate was filed by one Golak Chandra Bera, who is one of the alleged executors of the will said to have been executed by the deceased, Trailokya. The allegation is that on the 20th October, 1955, he duly executed a will in favour of his relatives in presence of attesting witnesses. The suit was contested by his widow, Golapi, (defendant no. 1) and also by one Gitanjali Pramanick, (defendant no. 3), who filed separate written statements. Their defence is almost on similar lines. They allege inter alia that Trailokya did not execute any such will. It was manufactured after his death.

2. The learned Subordinate Judge disbelieved the plaintiff''s version and said that the suspicious circumstances had not been removed. The will in question was not conscious act of Trailokya and it was not a genuine document. The prayer was, therefore, refused and the suit was dismissed.

Hence this appeal by the plaintiff. Golak Chandra.

3. The learned Advocate appearing on behalf of the appellant has stated that the learned Subordinate Judge did not refer to many documentary evidence including the letters, (Ext. 2 series) written by one Bimalananda, son of Trailokya''s brother, Baikuntha and husband of defendant no. 3, Gitanjali. He renounced the world, became an ascetic and used to live in Gauriya Math from before 1955. Consequently, Trailokya thought it proper not to give any portion of his property by the disputed with (Ext. 1) to Bimalananda or to any member of his family or to his wife, Gitanjali. After becoming an ascetic, he assumed the name of Brajendra Nandan Das. These letters show that though he had renounced the world, he asked for money from his father regularly from before 1955. Even when he was a student of College, he wrote a letter, Ext. 2 (i) dated 9-10-1947 to his sister, Asha. That letter clearly shows his bent of mind. The Court will have no hesitation in holding that he was a religious type of man from Ms student days. Therefore he left the world, as stated by P.W.3, Rakhal, and other P. Ws. This has also been stated in the documentary evidence, Ext. 3, executed by Golapi on the 16th October, 1966. Of course, the will was executed in 1955, but the present suit filed in 1968. But proper explanation has been given by P. W. 6, Golak, executor of the will. He had stated that there was Bhag Chas and thus a search was made by P. W. 5, Bibekananda, for Trailokya''s documents. After that search, the present will, Ext, 1, was discovered in Baisakh, 1375 B. S. So, delay has been sufficiently explained and all the suspicious circumstances have been removed. Of course, subsequently, Trailokya and Golapi purported to take Bimalanda as their adopted son and had also executed a document (Ext. O) on the 8th November, 1957, stating that Bimalananda was their adopted son, But that deed has been declared invalid by the High Court, because at the time of the alleged adoption Bimalanda was a married fellow. Gitanjali has no locus standi to contest the suit because Bimalananda is alive and he did not contest the suit.

4. The learned Advocate appearing on behalf of the respondents supported the decision of the learned Subordinate Judge and cited the bench case of Ramen vs. Shivarani in 67 C.W.N. 715.

5. The first question is whether the surrounding circumstances create suspicion and whether such suspicion has been removed in this case. It will be sufficient to refer to the well-known case of Ramchandra Rambux Vs. Champabai and Others, . It has been stated that in order to judge if the attesting witnesses are reliable, the Court is not confined only to the way in which the witnesses have deposed or to their demeanour. In order to do the same it is open to the Court to look into the surrounding circumstances as well as the probabilities. The issue, if the testator executed a will and if it was duly executed and attested by the witnesses, cannot be determined by considering the evidence adduced in the Court separately from the surrounding circumstances, which have also been brought out in the evidence, or which appear from the nature and contents of the document itself. The contrary decision of Costello and Biswas, JJ, in the case of Kristo Gopal Nath Vs. Baidya Nath

Khan and Others, was overruled. The argument advanced before the Supreme Court on behalf of the appellant, that the High Court made a wrong approach by first taking into consideration various circumstances and "then it judged the credibility of the witnesses in the light of those circumstances, was repelled. In that case on 23-5-1947, Ramdhan, executed a will bequeathing almost all his properties to one Ramchandra by excluding his wife and 3 daughters and stated that his wife would get a monthly maintenance of Rs. 40|-. It was held that the will was not genuine.

6. The case of Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, at pages 77 and 78 shows that in cases where execution of a will is surrounded by suspicion, its proof ceases to be a simple lis between the parties. The question arises if the conscience of the Court has been satisfied by the evidence led that the will was duly executed and attested It is impossible to reach such conclusion unlese the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will. Such cases stand on a different footing and regarding such wills the test of satisfaction of judicial conscience has been evolved by the English Courts. The observation made by Gajendragadkar and A. K. Sarkar, JJ, in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , that presence of suspicious circum stances makes the initial onus heavy has been followed. In that case the testator, Govinda, had two wives, Gulab and Dalip. On 26-11-1945, he executed a will and bequeathed his properties to his grandson, Surjit, gave Dalip a life estate in his house at Simla and said that Gulab would get Rs. 50|- a month if she lived in a house at Sengpur. On 22-5-56, Gulab filed a suit asking for maintenance and alternatively prayed for half share in her husband"s property. On 20-8-56, Surjit asked for permission to produce the will. That will was not accepted by the Supreme Court. Let us apply these tests to the facts of this case.
7. The geneology of the family of Trailokya may be referred to in this connection

8. It is common ground that Sashi instituted a suit for partition against Trailokya and others and the latter filed a written statement in that suit. Of course, it has been stated by P. W. 5. Bibekananda, that they contested that case, but Trailokya did not contest the suit, though he had filed a written statement. But there is no cogent evidence on the same. On the other hand, an appeal was filed in this Court in connection with that suit, initiated by Sashi. The will, Ext. 1, shows that by executing that will, Trailokya purported to make the two sons of Sashi, namely, Benoy and Bejoy, legatees. When such litigation was pending, a same portion was not expected to make such unnatural disposition to Bibek, Bejoy and Benoy. When there is an unnatural bequest, the court will have to scrutinise the evidence about execution of a will with greater care, Smt. Sushila Devi Vs. Pandit Krishna Kumar Missir and Others, .

9. During the pendency of that litigation, Trailokya died and substitution was duly made. In the normal course, the will would have seen the light of the day at such substitution.

10. The evidence on the record and the disputed will, Ext. 1, will show that no near relation of Trailokya figured as an attesting witness or was present at its, alleged execution and there is no explanation of the same. The scribe as well as the attesting witness come from a different village and not from Trailokya''s village, Maishali.

11. There was unusual delay of about thirteen years by Golak in applying for probate. An explanation was given by P. W. 6 Golak that the will had been later found out by Bibekananda after a search. By that will Golapi was only given a life estate. It is common ground that Trailokya used to treat Bimalananda as his adopted son and so did his wife, Golapi. They executed a deed of adoption, Ext. O, on 8-11-1957 to that effect. But it has already been stated that such adoption was held to be invalid by this Court. Nevertheless the deed of gift, Ext. C(4), executed on the 24th January 1961, both by Golapi and Bimalananda in favour of the school to perpetuate Trailakya''s memory shows that they were on the best of terms. There is no reference to any will in those 2 deeds, Exts. O and C|4. In the natural course, it will be expected that by making the will, Trailokya would make some provision for Bimalananda and the members of his family. This proves that it was an unnatural bequest. Moreover, the evidence of P.W.1 Jnanendra Nath Mondal, scribe, and also of the other P. Ws. shows that after the execution of the alleged will, the draft of the will as well as the will, Ext. 1, was kept by Trailokya himself. It appears from the evidence that Trailokya used to live with Golapi and the members of Bimalananda''s family. When he died, all his boxes including the documents would be expected to remain in Golapi''s custody and after her death, in the possession of Gitanjali, contesting defendant no. 3. But that will, Ext. 1, is not coming from her custody. A cock and bull story has been set up by P. W. 5, Bibekananda, and P. W. 6, Golak, that the former found it out after a search. This cannot be believed because P. W. 5. Bibek cannot by any stretch of imagination be supposed to have to access to Trailokya''s boxes and documents. That is the most suspicious circumstance which has not been dispelled.

12. The documents, Ext. J series were filed on behalf of the defendant to show that Golapi acquired many properties. By that will, Ext. 1, Trailokya purported to dispose of the same by stating that he had acquired the same in the benami of his wife, Golapi. Of course, in a probate case, question of title is not relevant, vide the cases of Nishi v. Ashutosh in 17 C.W.N. 613 and Kashi vs. Govinda in 52 C.W.N 914, but that is a suspicious circumstance.

13. Then about the Nirupanpatra, Ext. M, executed on 12-1-1965 by Sashi regarding his properties. It appears from this document that the alleged executor P. W. 6, Golak, is a witness to its execution. This aspect cannot be brushed aside because the evidence of the witness as including that of the scribe, P. W 1. Jnanendra Nath Mondal, shows that the will was read aloud by Trailokya and P. W. 6 Golak was present on both the days on which it was scribed by him. Thus, the alleged attesting

witnesses and the alleged executor, Golak had knowledge of its contents. P. W. 6. Golak Chandra Bera, did not offer any explanation why having knowledge of the contents of such will, he put his signature to that Nirupanpatra, Ext. M.

14. Then about the deed of exchange, Ext. E (1), executed on the 24th January, 1961, between Bimalananda and Golapi on the one side and Baikuntha on the other. That shows that the relation between Bimalananda and Golapi was cordial in 1961. There seems to be no cogent reason for the exclusion of the members of Bimalananda''s family including his only son by that will, Ext. 1. It is an unnatural disposition. On behalf of the plaintiff a doubt was raised if Bimalananda''s daughter was a legitimate one. The evidence of D. W. 10. Golapi, indicates that when she was being examined on commission, Bimalananda''s daughter was sitting by her side. Her evidence on this is relevant u/s 50 of the Evidence Act as she had special knowledge about such relationship, vide the case of Dolgobinda Paricha Vs. Nimai Charan Misra and Others, at page 918.

15. The deed of exchange, Ext. E, executed on the 28th February, 1959 amongst Golapi, Aswini, Ananta Kumar Patra and Bhagabati shows that it was accepted by Ananta Kumar Patra, P.W. 6, Golak, says that Ananta Patra was present whom the will was executed It has been pointed out on behalf of the resependent that this Ananta Patra happens to be one of the alleged attesting witnesses to the execution of Trailokya''s will, Ext. 1. As stated before, that will was read aloud by him after it had been scribed by P. W. 1, Jnanendra Nath Mondal. It seems strange how after becoming an attesting witness to the execution of the alleged will, Ananta Kumar Patra could accept that document, Ext. E. Further, the registered Amnoktarnama, Ext. N, executed by Bimalananda Pramanick alias Brojendra Nandan Das on the 5th September, 1969, in favour of his wife, Smt. Gitanjali Pramanick shows that he described himself as the son of Late Baikuntha Pramanick and he is a resident of the village, Naishali, Pargana Majnamutha. The name of that village will appear from the alleged will, Ext.1. The application for probate also shows that Trailokya was a resident of Maishali, the name of the Pargana being Majnamutha. That registered Ammoktarnama does not show-that Bimalanda had, in fact, renounced the world and was parmanently residing in Gouria Math. These instances are wholly incongruous with the case of his becoming an ascetic. These are the suspicious circumstances which have not at all been cleared up on behalf of the alleged executor.

16. P. W. 1, Jnanendra Nath Mondal, scribe of the will, Ext. 1, the ether P. We, have stated that the will in question, Ext. 1. was duly executed and attested in their presence. This has also been stated by P.W. 2, Jiban Krishna Giri, P. W. 3. Rakhal Chandra Das, and P. W 4, Ramanath Girl. P. W. 6, Golak, says that the will was properly executed and attested.

17. The learned Advocate appearing en behalf of the appellant has stated that the deed of gift executed by Golapi, Ext. 3, on the 16th October, 1966, shows that

Bimalananda left home and had been residing in an ashram for eight years before the execution of the document. But even if the statement In that document be accepted as true, then Bimalananda''s residence at Gouria Math Would not be of the year 1955. when the alleged will. Ext. 1, was executed. Much cannot be made of such loose statement made by an old illiterate rustic woman.

18. Now regarding the probability of the matter. In the normal course, one would expect that the legatees would bear the expenses of the case. But P. W. 6 Golak, alleged executor, says that he himself has been incurring all the expenses of the probate case,

19. The records show that Bimalananda asked for money from his father, worked as a teacher and withdrew money from the post office. D. W. 6, Gitanjali, and D W. 10, Golapi, say that no such will was executed

20. The upshot of the aforesaid discussion is that we are not disposed to accept the contention put forward on behalf of the appellant. We hold that the Court''s conscience has not been satisfied, that the suspicious circumstances have not been explained and the alleged will, Ext. 1. was not duly executed and attested. We disbelieve the evidence of P. Ws. and hold that In or before or after 1955, Bimalananda did not renounce the world or become an ascetic.

21 The learned Advocate appearing on behalf of the appellant has stated that Gitanjali applied for examining Trailokya''s signature by a handwriting expert. But that report was not proved.

22. Law in this respect is well settled because the report of a handwriting expert is not conclusive and must yield to positive evidence, vide the cases of Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad Bhagat and Others, and Smt. Bhagwan Kaur Vs. Shri Maharaj Krishan Sharma and Others, .

23 Then about the question whether Gitanjali has any such locus standi. The bench case of Ramen vs. Shivarani (Supra) speaks of a case where a person denies the testator''s title. The deeds, Ext. J series, were produced to show that many properties were acquired by D. W. 10, Golapi. She purported to gift the same to Gitanjali, vide Ext. 3 dated 16-10-1966. The latter''s Interest in the property is at stake. In the case of Sarala Sundari vs Braja in LR 71 IA 1 Lord Atkin has stated that if one alleges fraud and says that he has been injured by the grant of the probate, he can apply to unsettle the probate. The bench case of Haripada vs. Ghanashyam in 49 CWN 713 at page 714 may be referred to show that any interest, however slight, and even the bare possibility of an interest entitles one to enter caveat in a probate case This has actually been done in this case, and we find that Gitanjali has locus standi to enter into such caveat. If the will goes, then the property left by Trailokya would pass to his widow, Golapi. When on 4-12-1957, Trailokya breathed his last, the Hindu Succession Act of 1956 had already came into force. Hence, according to the provisions of section 14(1) of the Act, she being in possession of his properly

acquired an absolute interest therein. She gifted her properties to Gitanjali.

24. We generally agree with the trial court''s observations. In view of the Supreme Court cases of Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, at page 1129 and State of Karnataka in 1981(2) S. C. C. 185 at pages 188 and 189 it is not necessary to dilate any more on this.

The appeal is dismissed. There will be no order as to costs.

P.K. Banerjee, J.

I agree.