
Shib Prosad Sadhukhan Vs Shri Nemai Chandra Ghosal

Appeal from Original Decree No. 365 of 1982

Court: Calcutta High Court

Date of Decision: April 18, 1990

Acts Referred:

Succession Act, 1925 " Section 102, 232, 233

Citation: (1991) 1 CALLT 160 : 94 CWN 908

Hon'ble Judges: Mukul Gopal Mukherjee, J; Jyotirindra Nath Hore, J

Bench: Division Bench

Advocate: Dhruva Kumar Bhattacharyya and Hazari Prosad Roy Chowdhury, for the Appellant; Ajit Kumar Roy, Satyanarayan Roy and Sudip Kumar Majumdar, for the Respondent

Final Decision: Dismissed

Judgement

Jyotirindra Nath Hore, J.

The present appeal is against the judgment and decree dated 24th April, 1982 passed by the learned Additional

District Judge, 1st Court, Howrah in Probate Case No. 7 of 1979 allowing the petitioner/ respondent's application for letters of administration

with a copy of the Will annexed in respect of the Will of the deceased Girish Chandra Sadhukhan dated 14.6.55. The petitioner/respondent's case

was as follows :

2. Girish Chandra Sadhukhan died on 17.3.61 at his place of residence at Champarail leaving a Will dated 14.6.55 which was duly executed and

registered on the same day and which was his first and last Will. Smt. Mallika Bala Dasi was a mistress of Girish Chandra Sadhukhan, a childless

widower and she lived with Girish as husband and wife at the place of residence of Girish at Champarail. Girish executed the Will on 14.6.55

bequeathing the disputed properties in absolute right to his said mistress Mallikabala Dasi. Mallikabala Dasi after the death of Girish sold the

disputed property to Motilal Khamaru by a registered deed of sale dated 9.2.66 and Mallikabala left for her father's house where she died on

16th Falgun 1374 B. S. without any issue. Girish Sadhukhan died leaving two nephews Krishna Chandra Sadhukhan and Nilmoni Sadhukhan and

both of them are dead. Nilmoni died leaving without any issue. Shib Prosad Sadhukhan, son of Jiban Krishna Sadhukhan is the only near relation

of deceased Girish Chandra Sadhukhan.

3. Motilal Khamaru in his turn sold the disputed property to Gita Rani on 9.12.74 and from Gita Rani the petitioner-respondent Nemai Chand

Ghosal purchased the property on 13.4.78. Since appellant Shib Prosad Sadhukhan filed Title Suit No. 177 of 1978 in the Court of 1st Munsif,

Howrah against the petitioner/respondent claiming that he acquired the suit property as heir of Girish Sadhukhan, the petitioner felt necessity for

filing the present suit for obtaining letters of administration on proof of the Will left by Girish in favour of Mallika.

4. O.P.-appellant contested the case by filing a written objection contending inter alia that the Will was not genuine and it was manufactured in

collusion with Matilal Khamaru in order to deprive the opposite party of his right of inheritance. It was further contended that Girish Sadhukhan

had no sound disposing capacity before his death and that he developed senility and was a puppet in the hands of Mallika.

5. Upon a consideration of the evidence on record and facts and circumstances of the case the learned Additional District Judge has held that the

petitioner has satisfactorily proved the execution and attestation of the Will and that the Will is a genuine document executed by Girish Chandra

Sadhukhan out of free will having testamentary capacity. He has further held that the petitioner has locus standi to file the application for letters of

administration. He, accordingly, allowed petitioner's application for issue of the letters of the administration of the Will of deceased Girish Chandra

Sadhukhan (Ext. 2A) with a copy of the Will annexed.

6. The learned Advocate for the appellant has challenged the findings of the Trial Court and contended that the disposition of property in favour of

the mistress to the exclusion of his nephews who were natural heirs, undue delay of 17 years in filing application for letters of administration,

absence of endorsement in the alleged Will as to reading over and explaining the contents of the Will to the executant, senility of the executor etc.

strongly suggest that the alleged Will was the product of undue influence and not free will of Girish Chandra Sadhukhan. It has also been

contended that another Will was executed by Girish Chandra Sadhukhan on the same day in favour of Subhasibala Desi, wife of his younger

brother late Prosad Chandra Sadhukhan and both the Wills are stated to be the last Wills of the testator and accordingly the disputed Will

executed in favour of Mallikabala Dasi cannot be said to be the last Will and testament of Girish Chandra Sadhukhan.

7. The last point that has been urged is that the petitioner/respondent has no locus standi to file an- application for letters of administration.

8. Motilal Khamaru (PW4) is the scribe of the alleged Will (Ext. 2A). He is also an attesting witness. Of the four attesting witnesses only two i.e.

Motilal Khamaru and Bibhuti Bhusan Sarkar were alive at the time of the hearing of the suit. PW4 Motilal Khamaru has proved the execution and

attestation of the Will. His testimony goes to show that he wrote the Will according to the instructions of Girish, which were given about a week

prior to the execution of the Will. The Will was executed at the sherista of PW4 at the registration office. Girish Sadhukhan put his signatures in

presence of the attesting witnesses including PW4 and the attesting witnesses also signed in presence of Girish Chandra. PW4 has proved the

signatures of Girish and signatures of other attesting witnesses including his own. After execution the Will was presented for registration and it was

registered on the same date. It has been elicited in the cross-examination of PW4 that the writing of the Will was completed at his house and on the

date of execution Girish came to his house and enquired if the writing had been completed and he answered in the affirmative. Thereafter Girish

went to his sherista and executed the Will in presence of the attesting witnesses. This shows that the Will was written by PW4 entirely according to

the instructions of Girish and that Girish, though old, was quite physically fit. He himself went to the house of PW4 to enquire about the writing of

the Will and then himself went to the registration office and executed the Will in the sherista of PW4. It may be noted here that Girish died on

17.3.61 about 6 years after the execution of the Will. The Trial Court has, therefore, rightly held that Girish had testamentary capacity at the time

of execution of the Will. Another Will was also executed by Girish in favour of, his younger brother's wife Subhasibala Dasi (Ext. 2) on that date

PW4 was also the scribe and attesting witness of that Will. Both the Wills were executed at the same time at the sherista of PW4 and presented

for registration one after another. The Will in favour of Subhasibala (Ext. 2) has been numbered 27 and the other Will (Ext. 2A) has been

numbered 28. Subhasibala transferred her interest in the property bequeathed to her to the present opposite-party-appellant Shib Prosad

Sadhukhan. Jiban Krishna Sadhukhan acted as an attesting witness in this deed. If Girish had the testamentary and physical capacity to execute the

Will (Ext. 2) which is not and cannot be disputed by the O.P.-appellant, there is no reason why the Will (Ext. 2A) should not be taken to have

been executed by Girish with full sense and having sound disposing mind.

9. The disputed Will does not appear to be unnatural and there is really no suspicious circumstance. It is not disputed that Girish Chandra had no

wife and issue living in 1955 when the Will was executed. There is no dispute that Mallikabala was living with Girish Chandra in his house as his

mistress. She lived with Girish Chandra as husband and wife and looked after him in his old age. The other Will, (Ext. 2) shows that Subhasibala,

wife of his deceased third brother also looked after him. His two nephews did not live with him and they did not look after him. There appears to

be nothing unnatural in these facts and circumstances to make provisions for the two women who took care of him and looked after him at his old

age and bequeath his property to them. It is to be noted here that the entire property of Girish Sadhukhan was not bequeathed to Mallikabala. Part

of it was also bequeathed to Subhasibala which is now in possession of the appellant by virtue of purchase from Subhasibala by Ext. 1.

It is true that the Will was produced for obtaining letters of administration about 17 years after its execution. This may not be normal but by itself it

cannot be called a suspicious circumstance. Merely because there was delay, it does not lead to the conclusion that by itself it is a suspicious

circumstance vide The Division Bench Decision in Smt. Bijoya Bala Sadhu v. Sanat Kumar Sadhu and Ors. Cal. LT. 1988(2) HC 9. It may be

mentioned here that another Will executed on the same day by Girish in favour of Subhasibala (Ext. 2) through which the opposite party-appellant

claims title and possession in respect of the properties covered by the said Will was never produced to court for obtaining probate or letters of

administration. The petitioner's explanation is that he did not think it necessary to file an application for letters of administration with a copy of the

Will annexed so long as his possession was not disturbed and his title was not clouded till institution of the suit by the opposite party. It appears

from the several Kobalas (Ext. 1 series) and from the evidence of PW4 and also from the boundaries mentioned in the Kobala of the opposite

party that Mallikabala and thereafter the successive transferees were in possession of the disputed property. The evidence shows that Jiban

Krishna never claimed any interest in the properties left by Girish Chandra and in fact acted as an attesting witness in the Kobala executed by

Subhasibala in favour of his son Shib Prosad Sadhukhan, the present appellant. Considering the facts and circumstances of the case the mere fact

that there was undue delay in producing the Will for obtaining letters of administration cannot be accepted as a suspicious" circumstance.

10. The contention of the learned Advocate for the appellant that the disputed Will cannot be regarded as the last Will and testament of Girish

Chandra Sadhukhan in view of the execution of another Will (Ext. 2) on the same date has no substance. As stated earlier, both the Wills were

executed at the same sitting and presented for registration at the same time. The properties in the two Wills are different. Part of the property of the

testator was bequeathed to Mallikabala and the remaining part to Subhasibala. Though the two dispositions could have been normally made by the

same Will, in his wisdom the testator executed two separate Wills in favour of the two legatees though at the same sitting. Even technically the

disputed Will (Ext. 2A) is the last Will and testament inasmuch as it was presented for registration after Ext. 2.

11. We have, therefore, no hesitation in holding that the petitioner/ respondent has satisfactorily proved the due execution and attestation of the

disputed Will (Ext. 2A) and that the said Will was the product of free will of the testator Girish Chandra Sadhukhan having full testamentary

capacity and that the Will is genuine.

12. The next point for our consideration is whether the petitioner has locus standi to file the application for letters of administration with a copy of

the Will attached. No executor has been appointed in the Will. Admittedly, the sole legatee in the disputed Will Mallikabala Dasi died without

leaving any heir. The learned Advocate for the appellant has contended that the petitioner not being an heir of the testator, nor a legatee nor a

representative of a residuary legatee has no locus standi to file an application for grant of letters of administration. We are unable to accept the

contention. The petitioner/respondent appears to be a representative of residuary legatee Mallikabala Dasi and/Section 233, Indian Succession

Act is applicable in this case. u/s 102 of the Indian Succession Act 1925 a residuary legatee may be constituted by any words that show an

intention on the part of the testator that the person designated shall take the surplus or residue of his property. The words ""residuary legatee"" have

not been defined in the section. The section only lays down how a ""residuary legatee"" can be constituted by words of the testator indicating his

intention that the legatee designated shall take the residue or surplus of his, estate. It is the settled law that no particular form or mode of expression

is necessary to constitute a residuary legatee. It is sufficient if the intention of the testator is expressed to give the surplus of the estate, after

payment of debts and other legacies to the person designated. The words ""rest and residue"" are also redundant. The probate court has power to

construe a Will in deciding whether the applicant has locus standi to file the application for grant of letters of administration with the copy of the

Will annexed. It is recited in the Will that the legatee Mallikabala Dasi will perform after the testator's death, the rites, sradh etc. entertain guests

and Brahmins etc. and meet the expenses from the estate of the deceased and will also pay the debts and thereafter the estate will vest absolutely

in her. It is clear from the recitals that the intention of the testator is to give surplus of his estate after payment of debts and performance of funeral

rites, sradh ceremony and entertainment of guests and Brahmins etc. to Mallikabala Dasi. In our opinion, Mallikabala Dasi was constituted a

residuary legatee and not a universal legatee as contended by the learned Advocate for the appellant. Moreover, we have already seen that all the

properties of the testator were not bequeathed to Mallikabala by the impugned Will. The remaining properties of the testator were bequeathed to

Subhasibala by another Will executed on the same day and at the same sitting (Ext. 2). Though both the dispositions were not made by the same

Will the fact remains that only a part of the properties was given to Mallikabala by the impugned Will and the remaining part of the property of the

testator was bequeathed to Subhasibala by another Will executed at the same time. In such a circumstance Mallikabala must be regarded as a

residual legatee. Section 233 of the Indian Succession Act provides that when a residuary legatee who has a beneficial interest survives the

testator, but dies before the estate has been fully administered, his representative has the same right to administration of the Will annexed as such

residuary legatee. In *In Re: Manji Jetha Lakhani*, it was held that the word "representative" is not to be given the restricted meaning of a "legal

representative" and it must have a wider and more popular meaning than "legal representative" unless the context makes it synonymous with it. By

virtue of a series of transfer the plaintiff/respondent being the last transferree has interest in the disputed land and is interested in obtaining the

letters of administration with the copy of the Will annexed in order to validate his title. He must, therefore, be regarded as a representative of the

deceased residuary legatee Mallikabala Dasi and as such has locus standi to file an application for grant of letters of administration.

13. There is thus no substance in the appeal which is dismissed in context with costs. The judgment and decree of the court below are affirmed.

M.G. Mukherji, J.

14. I agree.