Saral Patwar Vs Sushila Dassi

Court: Calcutta High Court

Date of Decision: Feb. 9, 1983

Acts Referred: Succession Act, 1925 â€" Section 63

Citation: 87 CWN 445

Hon'ble Judges: Chittatosh Mookerjee, J; Amitabha Dutta, J

Bench: Division Bench

Advocate: B.C. Dutt and P.B. Chakraborty, for the Appellant;S.N. Mukherjee and Bhaskar Ghosh, for the Respondent

Judgement

1. Sm. Sushila Dassi, the opposite party in this Application, has made an application before the District Delegate, Alipore, 24-Parganas, for

granting probate in respect of the alleged will of late Lachmani Dassi, Benarasi Lal Patwar was the brother of the deceased testatrix, Lachmani

Dassi, and he was also the father of the propounder, Sm. Sushila Dassi, and of Saral Patwar, the petitioner in this Revisional Application. On 24th

July, 1981 said Benarasi Lal Patwar had appeared in the probate case filed by her daughter, Sm. Sushila Dassi and had purported to give his

consent to the granting of probate in respect of the alleged will of Lachmani Dassi. On 4th September, 1981 Sm. Girija Patwar, the wife of said

Benarasi Lal Patwar, had appeared in the said probate case and had filed a caveat. Thereupon, the said case had been treated as a contested one

and registered as a suit.

2. On 14th April, 1982 said Benarasi Lal Patwar, died and thereupon his widow, Girija Patwar, who was the plaintiff in the said case had filed an

application for bringing on record the present petitioner and others heirs and legal representatives of deceased Benarasi Lal Patwar. On 21st April,

1982 the court had rejected the said application holding, inter-alia, that in his lifetime Benarasi Lal Patwar having given his consent to the grant of

probate, his heirs had no locus standi to challenge the alleged will of Lachamani Dassi propounded by Sm. Sushila Dassi. Girija Patwar had herself

claimed title in respect of Premises No. 2/1, Sambhu Babu Lane, Calcutta -14 mentioned in the alleged will made by Lachmani Dassi. Girija

Patwar, inter-alia, claimed that Lachmani had no right to bequeath by will the said property. Girija Patwar"s caveat was not entertained and the

application for probate filed by Sm. Sushila Dassi was again treated as an uncontested one.

3. In July,1982 the present petitioner filed two applications before the District Delegate, Alipore, 24-Parganas.He stated that he was one of the

legal heirs of Lachmani Dassi after the death of his father, Benarasi Lal Patwar. He had come to learn that the general notice was served on 25th

May,1982.He alleged that Sm. Sushila Dassi had propounded a fictitious will only to deprive the rights of the petitioner and others. Saral Patwar,

the petitioner, prayed that he may be allowed to contest her application for granting probate. He also prayed before the learned district Delegate

for appointing a hand-writing expert to compare the signature of his father, Benarasi Lal Patwar, in the declaration with his alleged admitted

signature in the Vokalatnama and the written objection in Case No. 54/76-TR-387/76. The applicant alleged that the signature appearing in the

declaration giving consent to the grant of probate was not the genuine signature of his father, Benarasi Lal Patwar and the said consent was a

forged document.

4. The learned District Delegate by his order complained of, has rejected the aforesaid prayers of the petitioner holding, inter-alia, that he had

already found by his order dated 21st April, 1982 that the heirs of Benarasi Lal Patwar had no locus standi to challenge the will in question

because the applicant''s father, Benarasi, had appeared and had filed consent petition. Therefore, the applicant who was one of the sons of

Benarasi was not entitled to file any objection. As he was not a party in the case, his prayer for referring the handwriting of his father in the consent

petition to an expert could not be entertained.

5. The short point is whether the petitioner can be considered as a person Ã¯Â¿Â½claiming to have any interest in the estate of the deceased to come

and see the proceedings before the grant of probateÃ¯Â¿Â½. Mr. Dutt, learned advocate for the petitioner, has rightly submitted that it is settled law

that the aforesaid expression Ã¯Â¿Â½claiming to have any interest in the estate of the deceasedÃ¯Â¿Â½ in section 283(C) of the Indian Succession Act,

1925 is wide enough also to include persons having possibility of an interest. In case, his interest is such as is or is likely to be prejudicially or

adversely affected by the grant, a person would be qualified to receive citation.

6. When the testatrix, Lachmani Dassi, died and the succession to her estate opened Benarasi Lal Patwar, the father of the petitioner, was alive

and in the event Lachmani Dassi died intestate in the absence of any other nearer heir Benarasi Lal Patwar would be an heir of her sister, Lachmani

Dassi. If on the other and, Lachmani Dassi left a valid will, her property would be devolve according to the terms of her alleged will, According to

the opposite party, who has propounded the alleged will of Lachmani Dassi, citation was issued to Benarasi and Benarasi had appeared and had

allegedly given his consent to granting of probate in favour of Sushila Dassi, who happened to be a daughter of Benarasi Lal Patwar. On 14th

April,1981 Benarasi Lal Patwar died. The petitioner, who is one of the heirs of Benarasi has claimed to have an interest in the estate of the

deceased testatrix, Lachmani Dassi. It in his life time the petitioner''s predecessor-in-interest had validity given his consent and thereby allegedly

made an admission, the petitioner who derived his interest through Benarasi would be bound by the same. As one of the legal representatives of

Benarasi Lal Patwar, the petitioner could not be allowed to take a stand inconsistent with that of his father Benarasi Lal Patwar.

7. We find no substance in the contention of Mr. Dutt that the alleged admission made by Benarasi, the petitioner''s predecessor, was not relevant

because the burden of proof would be always upon the propounder. It is settled law that Ã¯Â¿Â½the will has to be proved like any other document

except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other

documents so in the case of proof of wills, it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual

test of satisfaction of the prudent mind in such mattersÃ¯Â¿Â½ (vide observations in paragraph 18 of the Supreme Court decision in H. Venkatachala

Iyengar Vs. B.N. Thimmajamma and Others,). The Supreme Court in the said case pointed out that there was one important feature which

distinguished will from other documents. The testator having departed the world cannot say whether it is his will or not; and this aspect naturally

introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and

testament of the departed ancestor. In cases where the execution of will is surrounded by suspicious circumstances, the initial onus would be heavy

and unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator.

8. But the right to oppose grant of a probate may be lost by admission. Mr. Mukherjee, learned advocate for the opposite party, has cited the

following two reported decisions which lay down the above proposition. In Robinson v. Cooper 1831 (4) Sim. 131, 58 E.R. 50, in a suit to carry

into execution the trust of a will one of the defendants who was the heir at law of the testator, by his answer admitted the will, but before the will

was established by the decree of the court that defendant died and the suit was after words revived against his heir who was adult. In the

circumstances, the court held the derivative heir would be bund by such admission losing right to oppose the will. Similarly, in Liversey v. Harding

48 ER 183 an heir at will in his answer to a bill to establish a will admitted that the will was well-executed and the sanity of the testator. The heir

died and the bill was revived against his brother who disputed the execution of the will and the sanity of the testator. The Master of Rolls held that

the court would not allow him to do so. These decisions undoubtedly support the proposition that right to oppose grant of probate may be lost by

admission and such an admission of an heir at law would be binding upon the derivative heirs. But the court would not certainly grant probate only

on us propendi remains and the propounder would be required to satisfactorily prove the will. Further, before the court deprives a derivative heir

from opposing the will on the ground that his predecessor had made an admission, the court ought to be satisfied that such admission was genuinely

made and that the same was clear and unambiguous about the genuineness of the will.

9. In this connection we may also refer to some of the reported cases dealing with the question whether grant of probate or letter of Administration

can be revoked on the ground that no citation had been issued to a person having interest in the estate of the deceased. It has been consistently

held that when a person who had full knowledge of the proceedings to obtain the grant and to make himself a party to the proceedings, did not do

so, he would be bound by the grant of Probate or Letter of Administration and he would not be entitled to apply for revocation (see Shyama

Charan Baisya v. Prafulla Sundari Gupta AIR 1916 Cal. 623 and Narendra Nath and Another Vs. Sm. Fakirmani Dassi and Others,). But, in

case there was no acquiescence, a person''s remedy on the ground of waiver cannot be considered to have become barred. We may also refer to

the Division Bench decision of the Patna High Court in Bibhuti Prasad Chaudhury and Others Vs. Mt. Pan Kuer and Others, . In the said case,

citation had been issued to the nearest agnatic relation and his heir after the death of the testator and such person had unsuccessfully contested the

application for grant of the letters of administration of the testator''s estate. The court held that the son of such person had no locus standi to apply

for revocation of the letter of administration on the ground there had been no citation on him.

10. In our view, the same principles of law ought to be applied for deciding the locus standi of the petitioner to appear and contest the probate

proceeding. If his predecessor, Benarasi Lal Patwar did not genuinely give his consent the probate case. If on the other hand, his father, Benarasi

Lal Patwar, had given his consent and had acquiesced and had waived all objections to grant of probate in favour of Sushila Dassi in respect of the

will of the deceased testatrix, the petitioner subsequently deriving his interest through his father, Benarasi Lal Patwar, would be bound by such

consent and admission made by Benarasi. In this connection, we may refer to the sub-rule (2) of Rule 4 Order 22 of the Code according to which,

any person who is made a party as a legal representative of a deceased defendant, may make any defence appropriate too his character as such

legal representative.

11. The court below, however, has failed to exercise its jurisdiction by not first deciding whether the consent filed on behalf of Benarasi Lal

Patwar, was genuine. In fact, Mr. Mukherjee learned advocate for the opposite party No. 1, did not dispute this legal position but contended that

Benarasi Lal Patwar had really given his consent to grant of probate in favour of the propounder, Sushila Dassi. We hold that before deciding that

the petitioner was bound by the said consent given by Benarasi Lal Patwar, the court below ought to have first given an opportunity to the

petitioner to prove his allegation that the said consent of his father was a forged one. We, accordingly, remit the matter back to the trial court for

again deciding in accordance with law whether or not Benarasi Lal Patwar had in fact consent and would have no further locus standi to contest. If,

on the other hand, it is found that Benarasi Lal Patwar did not consent, then the petitioner would be entitled to appear and contest the probate

proceedings. The Revisional Application is disposed of accordingly.

Amitabha Dutta, J.

12. I agree.