Smt. Gunjari Das Vs Sri Subal Chandra Das and Others

Court: Calcutta High Court

Date of Decision: May 21, 2009

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

Citation: (2010) 2 CALLT 157 : (2010) 7 RCR(Civil) 2238

Hon'ble Judges: Tapan Kumar Dutt, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Pratik Kumar Bhattacharya, for the Appellant;

Final Decision: Allowed

Judgement

Tapan Kumar Dutt, J.
Heard the Learned Advocate appearing on behalf of the appellant. None has appeared on behalf of the

respondents inspite of notice when this matter was called for hearing.

2. It appears from the materials on record and the submissions made by the said Learned Advocate that one Sri Bhundul Das made an application

for grant of probate in respect of the registered WILL and last testament dated 7th April, 1982 executed by one Smt. Bakya Bewa whereby she

bequeathed the properties mentioned in the said WILL in favour of the said Sri Bhundul Das and the appellant (Smt. Gunjari Das). Bhundul Das

was the eldest son of the testatrix, and Smt. Gunjari Das (appellant) is the widow of the predeceased son of the testatrix namely, Rajendra Nath

Das. It also appears that in the said WILL it has been stated that after the death of the testatrix the said Sri Bhundul Das and the appellant should

obtain probate of the WILL from a proper Court of Law. It further appears that the said Bakya Bewa had another son namely, Sundar Das, who

also pre-deceased the said testatrix but the testatrix did not bequeath any property in favour of the heir and legal representatives of Sundar Das

under the said WILL. Bhundul Das made an application for grant of probate in respect of the said WILL but he died during the pendency of the

proceedings before the learned Court below and the present appellant was transposed to the category of the applicant for the grant of probate.

3. The said application for grant of probate was contested by Subal Das, son of late Sundar Das, who happened to be the Defendant No. 2 in the

said proceeding which was converted into a suit being O.S. No. 6 of 1988 before the learned District Judge, Alipore. The said suit was re-

numbered as O.S. No. 7 of 1991 and it was placed for hearing before the learned 11th Additional District Judge, Alipore. It appears that only the

Defendant No. 2, that is, the aforesaid Subal Das, contested the said proceeding by filing a written statement alleging inter alia that the testatrix had

no physical or mental condition to make the said WILL and she had no intention to make such WILL, He further alleged that the testatrix was an

illiterate person and could not understand the implication of the said WILL and the said WILL was not executed by the testatrix and the left thumb

impression was not given by the testatrix and the said WILL is vitiated by fraud and collusion between the Plaintiff and other interested persons.

The said Defendant No. 2 further stated in his written statement that there was a deed of gift in respect of a portion of the property in the suit.

4. The said suit came up for hearing when evidence was adduced on behalf of the respective parties. There were two witnesses on behalf of the

Plaintiff in the suit namely, the appellant herein and one Sri Ram Prasad Shaw, an attesting witness. On behalf of the Defendant No. 2, only the

Defendant No. 2 himself deposed.

5. The learned Court below by the impugned judgment and decree dismissed the said suit. It appears from the impugned judgment that P.W. 1

who is an attesting witness to the said WILL is also a local person and he had a grocery business at 33, Tollygun Circular Road, Kolkata. The

learned Trial Court dismissed the suit on certain findings. One of such findings was that the said attesting witness (P.W. 1) did not appear to be a

truthful witness since he has stated in evidence that preparation, execution and registration of the WILL were all done on the same day but the

WILL itself shows that the typing was done on 07.04.1982 and the registration was done on 08.04.1982.Thus, according to the learned Trial

Court, the oral testimony of P.W.1 contradicted the very WILL (Ext. 3) itself. It is true that from a perusal of the WILL, it appears that the said

WILL was prepared on 07.04.1982 and it was registered on 08.04.1982 but it has to be remembered that P.W.1came to give evidence in 1994,

that is, after about 12 years from the time of execution and registration of the WILL. It may be that after such long lapse of time the said P.W. 1

could not be exact with regard to the precise time of registration of the WILL but that by itself, without anything more, cannot be a reason for a

Court of Law to discard the entire evidence of such witness. The evidence of P.W.1 clearly proves the case of the appellant for grant of probate.

The P.W. 1 as an attesting witness to the WILL has stated in evidence that he had signed the WILL as a witness and the testatrix had put her left

thumb impression on the said WILL and the said WILL was read over and explained to the testatrix by one Bimal Babu, a law clerk. He has

further stated in evidence that at the time of execution of the WILL the testatrix was physically fit and mentally alert and the WILL was scribed as

per instructions of the testatrix. He has also stated that other attesting witnesses have died. Thus, the finding of the learned Trial Court with regard

to the truthfulness of the evidence of P.W. 1 is without any substance.

6. The learned Trial Court further made a finding that the testatrix was not physically fit and mentally alert at the time of execution and registration

of the WILL since she had mentioned in the WILL that the property at Tollygunge Circular Road comprises an area of four cottas of land with

structures thereon whereas the said testatrix had earlier gifted one cottah of land with structures thereon out of the said four cottas of land and

structures to her grand-daughter namely, Smt. Arati Das, by a registered deed of gift dated 30th December, 1974. According to the learned Trial

Court the fact that the testatrix was 95 years old at the time of execution of the said WILL and the fact that she did not remember that she had

earlier gifted a portion of the property bequeathed to the beneficiaries of the WILL shows that the testatrix was not physically fit and mentally alert

at the time of execution of the WILL. According to the learned Trial Court the testatrix had definitely developed senility at the age of 95 and she

had no testamentary capacity in the year 1982 when the WILL was executed.

7. There is no dispute with regard to the deed of gift executed by the testatrix in favour of her grand-daughter in the year 1974, that is, about 8

years before the execution of the WILL. Thus, it can be safely concluded that the relationship between the testatrix and the said Smt. Arati Das

had been sweet and cordial. In the said gift deed the testatrix had stated that the said Arati Das had been very affectionate to the testatrix and the

testatrix also loved her and Arati Das was brought up by the testatrix since childhood and was given in marriage by the testatrix to a suitable

groom. This Arati Das is the daughter of Late Rajendra Nath Das and the present appellant Smt. Gunjari Das. Thus, it appears that the testatrix

had a good relationship with the family of her pre-deceased son Rajendra Nath Das. It may be that after a lapse of about 8 years the testatrix

forgot to take into account the fact that a portion of the property in question was already gifted to her grand daughter earlier but such solitary

instance of forgetfulness cannot be equated with loss of testamentary capacity. Such forgetfulness may result in a little misdescription of the

bequeathed property but the intention of the testatrix remains clear that she wanted to bequeath the property in favour of the beneficiaries

mentioned in the WILL the way she did it. There is nothing on record to suggest that the testatrix had lost her testamentary capacity at the material

point of time. The D.W. 1 (defendant No. 2) admitted in his evidence that the gift deed (Ext. A) was executed in favour of Arati Das by the

testatrix. He has further stated that he is conversant with the left thumb impression of his grand mother (testatrix) and in such background he did not

ask for examination of the left thumb impressions on Ext. 3 (WILL) by any handwriting expert. Thus, no dispute can be raised with regard to the

left thumb impressions of the testatrix on the WILL in question. D.W. 1 has further stated in his cross-examination that he has no document or any

evidence to show and establish that the said WILL is a forged one save and except his oral testimony. He could not even say whether any doctor

was engaged to treat Bakya Bewa during her illness and he has nothing at his disposal to prove the alleged illness of Bakya Bewa excepting his

oral testimony. Such piece of evidence, clearly proves that he did not have any relevant knowledge with regard to the state of health of the testatrix

at the material points of time and he was not even aware whether the testatrix really required any medical attention. In such circumstances, the

Defendant No. 2 was definitely not a proper person to make any comment with regard to the physical and mental state of the testatrix at the time

when the WILL was executed and registered It has also been revealed in the evidence of the said D.W.1 that a partition suit was filed at the

instance of the said Defendant but the same was dismissed. The said witness has further stated in cross-examination that he has no paper to show

and establish that the testatrix was ill since 1982. Thus it will appear from a perusal of the entire evidence on record that there nothing on record to

indicate that the testatrix did not have the required testamentary capacity for the purpose of the execution of the said WILL. It is true that the

testatrix was aged about 95 years at the time of execution and registration of the WILL but that by itself alone cannot be a ground for doubting the

testamentary capacity of the testatrix. It is not inevitable in all cases that at the age of 95 a person will become bereft of testamentary capacity. It

will always depend upon the circumstances of each case, and every case has to be decided on its own merits. In the present case there is nothing

on record to suggest that the testatrix was in any way disqualified to execute the said WILL. The testatrix lived for about four years after executing

the aforesaid WILL. Thus, the findings of the learned Trial Court in this regard, as indicated above, are also not supported by the materials on

record.

8. The learned Trial Court has also come to the finding that since no reliance can be placed on the evidence of P.W. 1 who is the only attesting

witness who gave evidence, it cannot be safely held that the provisions of section 63 of the Indian Succession Act 1925 has been complied with.

The learned Trial Court held that the propounder has failed to dispel the suspicious circumstances surrounding the WILL. It clearly appears from

record that excepting P.W.1 no other attesting witness was alive when the matter came up for trial and as such excepting P.W. 1 no other attesting

witness was available for giving evidence. The finding of the learned Trial Court with regard to the veracity of the evidence of P.W. 1 has already

been discussed and dealt with above. This Court does not find that there was any suspicious circumstance surrounding the WILL; on the other

hand, the execution of the deed of gift by the testatrix in favour of her grand-daughter, as aforesaid, lends further support to the fact that the

testatrix executed and got the said WILL registered in the way it was done. In our view, the learned Trial Court had no genuine reason to be

unable to place reliance on the evidence of P.W. 1.

9. The findings of the Learned Trial Court that the WILL is a collusive and fraudulent one and that the testatrix did not have the testamentary

capacity at the material time are not supported by the materials on record.

10. In view of the discussions made above, we find that the impugned judgment and decree is required to be interfered with and set aside.

Accordingly, the appeal is allowed and the impugned judgment and decree are set aside. The application for grant of probate which was converted

into a suit, as aforesaid, is allowed and the suit is decreed.

11. Let a probate be granted in respect of the last WILL and testament of the testatrix late Bakya Bewa as annexed to the application for grant of

probate.

12. There will, however, be no order as to costs.

Urgent Xerox certified copy of this judgment, if applied for, be supplied to the parties upon compliance of requisite formalities.

Bhaskar Bhattacharya, J.--I agree.