

(2010) 09 CAL CK 0093**Calcutta High Court****Case No:** C.O. No. 3472 of 2008

Sri Arabinda Kumar Pal and

Another

APPELLANT

Vs

Sri Ranjan Kumar Pal and Others

RESPONDENT

Date of Decision: Sept. 21, 2010**Acts Referred:**

- Constitution of India, 1950 - Article 227

Hon'ble Judges: Jyotirmay Bhattacharya, J**Bench:** Single Bench**Advocate:** Sabyasachi Bhattacharjee and Salil Kumar Maity, for the Appellant; Goutam Brahma and Pasupati Sana for the O.P. No. 1, for the Respondent**Final Decision:** Dismissed**Judgement**

Jyotirmay Bhattacharya, J.

This application under Article 227 of the Constitution of India is directed against an order being No. 56 dated 28th July, 2008 passed by the learned Additional District Judge, First Court at Tamluk, East Midnapore by which the prayer of the defendant Nos. 2 and 11 for referring the disputed signature of the testator in the impugned will to the hand writing expert for his comparison with the admitted signature of the said testator and for his opinion, was rejected by the learned Trial Judge. The said defendants were aggrieved by the said order. Hence the said defendants have come before this Court with this application under Article 227 of the Constitution of India.

2. Heard Mr. Bhattacharya, learned Advocate, appearing for the petitioners and Mr. Brahma, learned Advocate, appearing for the plaintiff/opposite party.

3. Let me now consider as to how far the learned Trial Judge was justified in rejecting the petitioner's said application in the facts of the instant case.

4. The said defendants are contesting the said probate proceeding by filing written statement therein. The genuineness of the signature of the testator on the impugned will, was challenged by those defendants in their written statement. The said defendants stated therein that the disputed signature appearing in the impugned will was created by false personification. To substantiate the said defence, the defendants filed an application for refereeing the disputed signature of the testator appearing in the impugned will to the hand writing expert so that he can submit a report with regard to the genuineness of the said signature of the testator after comparing the disputed signature appearing in the will with the admitted signature of the testator.

5. Petitioners" such prayer for reference was rejected by the learned Trial Judge by holding inter alia that such reference is not necessary in the facts of the instant case as the said defendants practically admitted the signature of the testator in the impugned will by not cross examining the attesting witness whose evidence was recorded in the said proceeding on commission. The learned Trial Judge thus held that in this background, reference as prayed for by the petitioners is not at all necessary.

6. The propriety of the said order is under challenge in this application at the instance of those two defendants namely, defendant Nos. 2 and 11.

7. The Probate Court is a Court of conscience. As such, the Probate Court is required to ascertain the genuineness of signature of the testator when execution of the will by the testator, is challenged by the caveator/defendant in the probate proceeding. Here is the case where the said defendants challenged the genuineness of the said will. The said defendants claimed that the said will was not executed by the testator. They further claimed that the signature which is appearing on the impugned will was created by false personification. As such the petitioner prayed for such a reference to the hand writing expert for his opinion.

8. After going through the defence taken by the said defendants in their written statement, this Court finds that they raised a very serious dispute with regard to the genuineness of the signature of the testator in the impugned will. On perusal of the written statement, an impression was created in the minds of this Court about the requirement of such reference, but this impression gradually eroded from the minds of the Court when this Court, on perusal of the evidence of the attesting witness, found that those defendants did not cross examine the attesting witness about the genuineness of the said signature of the testator in the impugned will. The effect of not cross examining the plaintiff's witness with regard to such material issue was considered by this Hon"ble Court in the case of A.E.G. Carapiet Vs. A.Y. Derderian, Fwherein it was held as follows:

Where the opponent had declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that

the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice.

9. The aforesaid principle which was laid down by this Hon'ble Court in the said decision was followed in a subsequent decision of this Hon'ble Court in the case of Krittibas Bhattacharya and Ors. v. State of West Bengal and Ors. reported in 1984 (1) CLJ 161 wherein it was held that "if a defendant fails to put essential and material question to the plaintiff's witness in cross examination, the defendant is deemed to admit the plaintiff's case on that point."

10. Following the principle which was laid down by this Hon'ble Court in the aforesaid decisions, this Court finds no hesitation to hold that by not cross examining the attesting witness on the question of genuineness of the signature of the testator in the impugned will, the said defendants practically admitted the genuineness of the signature of the testator in the said will. If that be so then, in my view, no such reference, as prayed for, by the petitioner is necessary as the said defendants practically have abandoned and/or given up their plea regarding the dispute relating to genuineness of the signature of the testator in the impugned will. Facts admitted need not be proved. As such no elucidation on the question of genuineness of the execution of the will by the testator, by reference to the hand writing expert, is necessary in the facts of the instant case.

11. Accordingly this Court does not find any justification to interfere with the impugned order. The revisional application thus stands rejected.

12. The Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.