

**(2014) 08 CAL CK 0099**

**Calcutta High Court**

**Case No:** F.A. No. 361 of 2009

Sabitri Pal

APPELLANT

Vs

Ramendra Kumar Das

RESPONDENT

**Date of Decision:** Aug. 5, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 99
- Evidence Act, 1872 - Section 67, 68
- Succession Act, 1925 - Section 281, 63

**Citation:** AIR 2014 Cal 235 : (2014) 4 CALLT 469 : (2015) 2 WBLR 583

**Hon'ble Judges:** A.K. Banerjee, Acting C.J.; Arijit Banerjee, J

**Bench:** Division Bench

**Advocate:** Sabyasachi Bhattacharya, Senior Advocate and Sohini Chakraborty, Advocate for the Appellant; Bidyut Kumar Banerjee, Senior Advocate and Arnab Roy, Advocate for the Respondent

**Final Decision:** Allowed

### **Judgement**

Ashim Kumar Banerjee, Actg. C.J.

1. Sachindra Nath Das bequeathed his properties by Will and testament executed and registered on October 18, 1982 appearing at pages 1-5 of part II of the paper book. By the said Will and testament Sachindra appointed his married daughter Smt. Sabitri Das as the sole executrix. Sachindra had no issue. He and his wife took Sabitri in adoption in 1970. Sabitri was the daughter of his elder brother Girindra. Sachindra arranged her marriage however, Sabitri did not have cordial relationship with her husband and she started staying with Sachindra about 5-6 months before execution of the Will. As per the Will, Sabitri would be entitled to reside in a portion of the dwelling house as also a sum of Rs. 100 per month for her maintenance and personal expense during the life time of the wife of Sachindra. After the death of Sachindra's wife, Sabitri would become the absolute owner of the dwelling house.

Sachindra died on December 11, 1994. Sabitri filed application for probate before the learned District Judge at Alipore on June 20, 2001 that was opposed by Ramendra Kumar Das who claimed to be the son of Girindra. In short, the parties were siblings by birth however, Sabitri became the adopted daughter of the testator whereas the respondent was his nephew.

2. PW1 Sabitri proved the Will. She identified the signature of the testator as also the attesting witnesses. She denied the defendant having 1/3rd share in the property as claimed by him. She also deposed, the wife of Sachindra died on November 23, 1993. She could not be shaken in cross-examination, including on the issue of adoption.

3. PW2 Mohit Mukherjee was one of the attesting witnesses. The relevant extract of his deposition is quoted below:

Sri Gangadhar Sengupta was the another attesting witness. This is his signature (marked ext. 1/3). Both of them signed in my presence. Similarly, I also signed in their presence. The contents of the Will were read over and explained to Sachinbabu. Instrument was registered in the office of the Registrar of Assurance. Sachinbabu was physically fit and mentally alert at the time of execution of the Will. Some other persons were also present at the relevant time.

4. In cross-examination he deposed, the testator signed on the very date of registration in his presence. However, he could not remember where he signed the Will. Pertinent to note, the witness deposed on August 2, 2005 and March 7, 2007 at the age of 65 years whereas the Will was executed on August 21, 1984, almost two decades had passed in between.

5. Gangadhar Sengupta the other attesting witness did not depose. We are not sure whether he was alive or not. The PW2 the attesting witness in his deposition stated, Gangadhar was present along with the learned Solicitor and his clerk, at the time of registration of the Will.

6. The learned Judge however, declined to grant probate on the ground, attestation was not properly proved. The judgment appearing at pages 43-49 did record the brief discussion on the evidence. The learned Judge recorded, the PW2 deposed, both of them signed in his presence however, he did not say in evidence that he had seen the testator to sign the Will. On this ground alone the Probate was refused. Hence, this appeal that we heard on the above mentioned dates.

7. Mr. Sabyasachi Bhattacharya learned Senior Counsel appearing for the appellant being assisted by Mrs. Sohini Chakraborty learned Counsel, would contend, the long span of time in between the execution and registration of the Will and the deposition before the Court might have resulted in minor discrepancy that should not be a ground to deny Probate of a Will that would foreclose fulfillment of the last wish of the testator. He would rely upon four decisions:

1. Sibo Sundhari Debi Vs. Hemangini Debi reported in Volume-IV Calcutta Weekly Notes Page-204.

2. Nand Kishore Rai and another Vs. Mst. Bhagi Kuer and others reported in All India Reporter 1958 Allahabad Page-329.

3. [Alok Kumar Aich Vs. Asoke Kumar Aich and Others,](#)

4. [Jamunabai and Others Vs. Surendra Kumar and Another,](#)

8. In the case of Sibo Sundhari Debi (supra) the Division Bench of this Court held,

That strict affirmative proof of due attestation is not absolutely necessary in cases of this class; and if the circumstances are such as to warrant the Court in reasonably concluding from those circumstances that the Will has been duly attested, probate may be granted.

That upon the whole evidence, it could reasonably be concluded that the Will had been duly attested in accordance with law.

9. In another Division Bench decision in the case of Alok Kumar Aich (supra) the Division Bench observed, minor discrepancy in the evidence would not be unusual and would not really affect the credibility of witness. In the case of Jamunabai (supra) the learned Single Judge of the Madhya Pradesh High Court held, u/s 281 a petition should be verified by at least one of the attesting witnesses and in any case the form provided under the said provision was directory as a guideline and non-compliance would not be fatal. In the case of Nand Kishore Rai (supra) the learned Single Judge of the Allahabad High Court observed, a mere irregularity as per Section 99 of the CPC was never fatal and non-compliance would not ipso facto deserve rejection of the petition.

10. Per contra, Mr. Bidyut Kumar Banerjee learned Senior Counsel would refer to Section 99 of the CPC and Section 281 of the Indian Succession Act and contend, even if the observation of the learned Judge referred to above, was taken as wrong it was the solemn duty of the appellant to cure the said defect that they failed to do. He would refer to the discrepancy in the evidence particularly of the attesting witness when he would say, execution and registration were done on the same day that would be contrary to the record. He would refer to page-20, 32 and 33 of the paper book showing the discrepancy.

11. Mr. Banerjee would lastly rely upon the decision in the case of [Girja Datt Singh Vs. Gangotri Datt Singh,](#) and [Illyas and Others Vs. Badshah alias Kamla,](#) to support his contention, the provision of Section 63 must be adhered to as a pre-requisite in obtaining the Probate of a Will or the letters of Administration, as the case may be.

12. After the hearing had been concluded and we had kept the judgment reserved Ms. Chakraborty filed an affidavit affirmed by Sri Mohit Kumar Mukherjee PW2. Paragraph 2 and 6 of the said affidavit is quoted below:

Due to bona fide mistake, the application for grant of probate filed by the Appellant abovenamed before the Additional District Judge, Fourth Court at Alipore bearing Original Suit No. 11 of 2008, was not accompanied by a verification by this deponent, although this deponent deposed in the said proceeding as PW2 to prove the execution of the said Will.

This deponent states and declares that this deponent is one of the attesting witnesses to the last Will and Testament dated October 18, 1982 of Sri Sachindra Kumar Das (Since deceased) which was subsequently registered on April 21, 1984 and this deponent was present and saw the said testator affix his signature in the said Will.

13. Section 63 of the Indian Succession Act read with Section 67 and 68 of the Indian Evidence Act, if read together, would require the executor and/or propounder of the Will as the case may be, to prove, the testator and the two attesting witnesses signed in each other's presence and at a time, one after the other when all three were present. If we read the evidence of PW2 we would get such evidence, may not be so articulate, possibly due to inefficient handling by the learned Advocate and the long gap in between the execution and registration of the Will and the date of deposition. We cannot be a mere onlooker when we notice, PW2 was examined on two occasions having an interval of two years. Mr. Banerjee in his usual fairness would submit, it was a curable defect. The attesting witness filed an affidavit as recorded above, that would, in our view, be sufficient compliance of the provisions of law.

14. The appeal succeeds and is allowed. The judgment and order is set aside. The appellant would be entitled to the Probate as prayed for. There would be no order as to costs.

15. Urgent Xerox certified copy of this order, if applied for, be given to the parties.

Arijit Banerjee, J.

I agree.