

(2017) 02 CAL CK 0047

CALCUTTA HIGH COURT

Case No: F.A. No. 1 of 2014 and CAN No. 7480 of 2015

Subhash Churan Law

APPELLANT

Vs

Tripti Law

RESPONDENT

Date of Decision: Feb. 28, 2017

Acts Referred:

- Succession Act, 1925 - Section 276

Citation: (2017) AIR(Calcutta) 121 : (2017) 2 ICC 173

Hon'ble Judges: Jyotirmay Bhattacharya and Ishan Chandra Das, JJ.

Bench: Division Bench

Advocate: Mr. B.B. Sarkar, Ms. Iti Dutta, Ms. Priti Jain, Mr. P. Sarkar, Advocates, for the Appellants; Mr. Sakya Sen, Mr. Aniruddha Chatterjee, Mr. Kushal Chatterjee, Mr. Meghnad Dutta, Mr. Avijit Saha, Advocates, for the Respondent/Applicant

Final Decision: Disposed Off

Judgement

Ishan Chandra Das, J.—This First Appeal has been directed against the judgment and decree, passed by learned Additional District Judge, 2nd Court, Alipore, 24 Parganas (South) in O.S. No. 4 of 2000 wherein Learned Judge decreed the suit in favour of the plaintiff/respondent herein on contest and allowed her prayer for getting the Will dated 28.09.1995 (Regd. on 14.12.1995) probated, subject to payment of requisite fees.

2. Being aggrieved and dissatisfied with the said judgment and decree, the defendants/appellants herein preferred this appeal on the grounds that learned Court below failed to appreciate the facts & law without considering the faults in the statement of the attesting witnesses, granted probate of the Will in question which was not properly executed according to law.

3. The facts of the case as revealed from the plaint of O.S. No. 4 of 2000 is that one Provas Charan Law @ Laha, a permanent resident of 223/1, Bidhan Sarani, P.S. Jorasanko, Calcutta - 700 006 executed a Will on 28.09.1995, got the Will registered

on 14.12.1995 but he died on 22.08.1996 at Woodlands Nursing Home, Calcutta-700 027. Such Will was executed in favour of the wife of testator, who is the sole respondent herein. The respondent/plaintiff claims that she being a house wife was not aware of all the properties left by her husband. In order to obtain the probate of the Will, the respondent filed an application before the learned District Delegate at Alipore, being probate Case No. 371/1996 for grant of probate.

4. The plaintiff/respondent further stated that a few minutes after the death of her husband on 22.08.1996 her mother in law died and for that reason the respondent instructed her authorised Advocate that her husband/testator died leaving no other near relations at the time of filing of the said application for probate. Subsequently, she came to know that her husband's brother & sisters (the appellants herein) are living and her husband also left several properties within and outside the district of 24 Parganas (South) and the probate would be ineffective in respect of the remaining properties situate outside the jurisdiction of 24 Parganas (South) for which the respondent had to file the application for granting probate of the Will executed by her husband before learned Court below having jurisdiction to grant such probate of the Will. The respondent herein was the widow of the testator and she was the sole executrix of the Will in question. The amount of assets as left by the testator were described in the schedule of the plaint and the respondent herein being the sole executrix applied for granting probate of the Will, left by her husband for acquiring those properties absolutely.

5. The appellants herein being the contesting defendants filed a written statement before learned Court below and contended that their father Parbutty Charan Law died intestate leaving widow Sadhan Bala Law, son Provas Charan Law & these three appellants herein who became the joint owners of the property left by their father, Parbutty Charan Law. They also contended that their brother Provas Charan Law died intestate on 22.08.1996 leaving his mother Sadhan Bala Law and the three appellants herein. They also stated that their mother Sadhan Bala dies a few hours after the death of her son Provas Charan Law, who died intestate leaving the appellants herein as her legal heirs. Denying and disputing the share of the respondent in the property left by Provas Charan, they claimed that the respondent herein claiming herself to be the sole legal heir/widow of the Provas Charan by an application for substituting her name as sole heir of Provas Charan Law in a suit for eviction against one Kailaspati Dalmia in respect of 4 Ballygunge Park Road, Calcutta - 700 019 got a favourable order before learned Civil Judge (Senior Division), 2nd Court, Alipore and the same is pending since a revisional application filed against the order of recalling is yet to be disposed of. Denying and disputing all other salient features including the proper execution and attestation of the Will. The appellants herein being contesting defendants in the probate proceeding claimed that immediately after the death of Provas Charan Law, his mother Sadhan Bala became the legal heir & after her death, these appellants acquired right, title & interest in that property, left by Provas Charan Law. Denying the right of the respondent herein

with regard to the grant of probate of the purported will, they ultimately prayed for dismissal of the said probate proceeding.

6. Upon framing 8 issues altogether on due consideration of the pleadings of the parties and upon consideration of the mode of execution of the will, the evidence of the executor (PW-2), and the evidence attesting witness (PW-1) and other attending circumstances, learned trial Court allowed the probate of the Will executed by Provas Charan upon observation that the said Will was freely and fairly executed by the testator.

7. Questioning the legality and propriety of the execution of the said Will as well as granting probate of the same, the present appeal has been preferred, as noted earlier.

8. Now, the point for consideration is whether learned trial Court was justified in granting probate of the Will dated 28.09.1995 in favour of the respondent.

9. The Court is under legal obligation to grant probate of a Will if it is established that the Will was freely and fairly executed in favour of the executor or others, as the case may be. From a critical appreciation of the facts and circumstances of the case, it appears that the testator was a doctor by profession and he died at Woodlands Nursing Home on 22.08.1996 but the Will itself (Exhibit - 1) (which is at page 2 of the Paper Book Part II) reveals that the said will was executed by the testator on 28.09.1995 and the same was registered on 14.12.1995. The averments of the said will is quoted below:-

"I have not made any will previously and I declare this to be my last will and Testament. I am now aged 60 years. I am childless.

I have got my wife Smt. Tripty Law also known as Smt. Tripty Laha.

My mother sm. Sadhan Bala Law has inherited sufficient properties and assets from my father late Parbutty Charan Law and she has no financial problem for her maintenance and medical treatment. It is not necessary for me to make any provision for her.

I appoint my wife Smt. Tripty Law as the sole Executrix under this Last Will and testament."

10. Mr. Sarkar, learned Counsel appearing for the appellants submitted that the Will was not properly executed since it was not duly attested by two attesting witnesses. Criticizing the manner of statement of Debabrata Biswas as PW-1, he also submitted that the attestation of the signature of the testator was not done in the manner, as prescribed by Section 63 (1) (C) of the Indian Succession Act, 1925. Clarifying the proviso to Section 68 of the Indian Evidence Act, he urged that the document being a Will is required to be proved by at least one competent attesting witness. Relying on a decision of the Hon"ble Apex Court in **H. Venkatachala Iyengar v. B. N.**

Thimmajamma & Others reported in AIR 1959 Supreme Court 443, he tried to impress that both the attesting witnesses were not examined to prove the document and there were suspicious circumstances in the process of execution of the Will particularly when the respondent/wife got substantial benefit by the Will causing deprivation of other legitimate successors of her mother-in-law, who was living at the time of execution of such Will. Placing reliance on another decision of the Hon'ble Apex Court in **Janki Narayana Bhoir v. Narayan Namdeo Kadam, reported in AIR 2003 Supreme Court 761**, he reiterated that one of the requirements of due execution of Will is its attestation by two or more witnesses for admitting it in evidence, and mere proving the signature on the Will was that of the testator is not enough without fulfilling the proof of all the formalities required under Section 63 of the Succession Act ♦ he opined. To fortify his argument with regard to removal of suspicious circumstances regarding execution of the Will before granting probate of the same, he urged, relying on another decision of the Hon'ble Supreme Court in **Kalyan Singh v. Smt. Chhti & others, reported in AIR 1990 Supreme Court 396**, that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. He also submitted that the factum of execution and validity of the Will could not be determined merely by considering the evidence produced by the executor. Criticizing the findings of learned trial Court, he also submitted that learned trial Court did not consider the essentials of law regarding grant of probate and the attending circumstances before it was allowed and he urged with a confident tune that the matter should be sent back on remand to learned trial Court for further evidence in terms of decision of the Privy Council **K.S. Bahadur Singh & Ors. v. Thakur Behari Singh & Ors., reported in AIR 1939 P.C. 117** and for proper appreciation of the same.

11. Mr. Sakya Sen, his learned counterpart expressed a contrary view with regard to the appellants' prayer for sitting aside the judgment and decree or for sending it back on remand for fresh decision. He with all fairness admitted the provisions regarding attestation of the will in terms of Section 68 of the Evidence Act, read with Section 63 (1) (C) of the Succession Act but submitted that the respondent being the sole executor of the will had got no role to play in executing the will in her favour and it was free & fair execution by the testator who bequeathed all the properties in favour of his wife (the respondent herein) and explained the situation in the said Will (Exhibit - 1) what prompted him to exclude his mother. Pointing out the averments of the said will (Exhibit - 1) he urged that the Will was executed freely and fairly in presence of the witnesses and one Debabrata Biswas (PW-1) proved the document as required by law for the purpose. Relying on a decision of the Hon'ble Supreme Court in **Babu Singh & Others v. Ram Sahai @ Ram Singh, reported in (2008) 14 S.C.C 754**, he urged that the onus is on the person alleging undue influence, if any, though he contended that there was no such suspicious circumstances. Surrounding the execution of the will and in fine, he submitted that learned trial

Court was justified in granting probate of the Will in favour of his client.

12. On careful consideration of the materials on record it appears to us that the will was executed by the testator about 1 year before his death and admittedly the said will was registered before the competent authority about 3 months after its execution. It was argued by the appellant before us that the will was executed under suspicious circumstances causing deprivation of his mother as well as his brother and sisters by full blood. Here, as it appears from the attending circumstances, the executor of the will is a complete house wife and there is no specific allegation against her that she played a prominent role in execution of the said will. The averments of the will as quoted earlier clearly revealed that it was consciously executed by the testator in presence of the witnesses and one of the attesting witnesses was examined to prove valid execution of the will. The attending circumstances also never suggested that the executor of the will had got any role to play before its execution. The Hon'ble Apex Court in a catena of decisions held the following to be treated as suspicious circumstances in dealing with valid execution of a will.

- (i) When a doubt is created in regard to the condition of mind of the testator despite signature in the will;
- (ii) When the deposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;
- (iii) Where the pro-pounder himself takes prominent part in the execution of the will which confers on him substantial benefit.

13. A plain reading of the averments of the will clearly indicates absence of those three essentials from which it can be ascertained that the will (Exhibit - 1) was not executed freely and fairly. Learned Counsel for the respondent, in course of his impressive argument, placed reliance upon a decision of this Court, in **Birendra nath Paul @ Barendra Krishna Paul and another v. Sankar Paul @ Kali Krishna Paul, reported in AIR 2015 Cal 272** and urged that, since exclusion of granting concession to the mother of the testator has been properly explained, no doubt can be created regarding free & fair execution of the Will. Drawing our attention to the certain inconsistencies in the order of signing of the will by the testator and/or the attesting witnesses, the learned Advocate appearing for the appellant tried to impress upon us that there was suspicious circumstances in the process of execution of the Will.

14. According to him, this suspicious circumstances could not be explained by the witnesses of the plaintiff, and, as such, the learned Court below ought to have held that the Will has not been duly proved by the attesting witnesses. He thus, submitted that when the attesting witness who was examined in the said proceeding was unable to prove the due execution and attestation of the Will, the other attesting witness who was available would have been examined by the

appellant and in the absence of examining the said attesting witness, the learned Trial Judge should have held that the propounder has failed to prove the genuineness of the Will accordingly.

15. We have considered this part of submission of the learned Advocate of the appellant. Considering the evidence as a whole, we do not find any such apparent inconsistency in the evidence of the attesting witness being P.W 1. All throughout he maintained in his evidence that the testator signed the Will in the presence of the attesting witnesses and thereafter the attesting witnesses signed in the presence of the testator. We do not find any inconsistency in the evidence of the P.W 1 in this regard, excepting in one part, i.e., the order of signing the Will by the attesting witnesses did not match with his earlier part of the evidence. This slightest variation in the evidence cannot lead us to hold that the execution of the Will by the testator or the attestation thereof by the attesting witnesses could not be proved by the attesting witness viz the P.W1. We do not find any suspicious circumstances concerning the execution of the Will.

16. Considering the facts and the attending circumstances of the case, we find substance in the argument advanced by Learned Counsel for the respondent and accordingly we are of opinion that learned trial Court was justified in granting probate of the will and his findings do not deserve any interference in this appeal. Hence, the appeal stands dismissed and the judgment and decree passed by learned trial Court in Original Suit No. 4 of 2000 are hereby confirmed. Let the L.C.R. be returned to the Court below allowing with the original copy of the will. Since it is an appeal arising out of a probate proceeding, formal decree need not be drawn up.

17. In view of disposal of the appeal, no further order need be passed on the application filed in connection with the appeal. The said application is deemed to be disposed of.

18. The records including the original Will, be sent down to the court below.

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