

Captaln Shankar Roy and Another Vs. Mrs. Severina Kumar and Another

Captaln Shankar Roy and Another Vs. Mrs. Severina Kumar and Another

SooperKanoon Citation : sooperkanoon.com/331209

Court : Mumbai

Decided On : Aug-05-1999

Reported in : 2000(1)BomCR176

Judge : Dr. B.P. Saraf and; Smt. Ranjana Desai, JJ.

Acts : [Succession Act, 1925](#) - Sections 57 and 224

Appeal No. : Appeal No. 724 of 1997 in Testamentary Suit No. 20 of 1984 in Petition No. 482 of 1983 with Appeal N

Appellant : Captaln Shankar Roy and Another

Respondent : Mrs. Severina Kumar and Another

Advocate for Def. : R.A. Shaikh and ;M.A. Attar, Adv.

Advocate for Pet/Ap. : K.F. Merchant, i/b Little & Co., Adv.

Judgement :

ORDER

Per Smt. Ranjana Desai, J.

1. In these appeals, order dated 6th May, 1997, passed by the learned Single Judge dismissing Testamentary Suit No. 20 of 1984 and Testamentary Suit No. 19 of 94 is impugned.

2. Briefly stated, the facts, which gave rise to these appeals, are as under:

One Maria Rita (Molly D'Souza) died at Bombay on 14th May, 1983. She had two sons, Vernom and Joyce and two daughters. Severina Kumar and Gloria. She was owner of an immovable property situate at 15, Convent Avenue, Santacruz (West), Bombay admeasuring about 314 sq.mtrs. or thereabout together with building standing thereon known as 'La Petite Flour' along with other immovables. Vernom has settled in Goa. Joyce has settled in London. Gloria married one Mr. Mayra Misquitta in 1968 and Severina married one Mr. R.C. Kumar in November 1973.

After the death of Maria Rita (Molly D'Souza), (hereinafter referred to as 'the deceased'), the parties in the present proceedings have staked their claim to her property on the basis of her alleged Wills. One Capt. Shankar Roy filed Petition No. 482/83 for probate of the Will allegedly executed by the deceased on 7-4-83. The grand daughter of the deceased, one Miss Giselle Misquitta filed Petition No. 331/92 for Letters of Administration with the alleged Will of the deceased dated 11-5-83 annexed.

In Petition No. 482/83 filed by Capt. Shankar Roy, Mrs. Severina Kumar, daughter of the deceased, entered a caveat opposing the prayer for grant of probate to Capt. Shankar Roy stating inter alia, that the Will allegedly executed by the deceased on 7-4-83 was forged and fabricated. The said petition was then numbered as Testamentary Suit No. 20 of 84. In Petition No. 331 of 92 filed by Giselle Misquitta, Capt. Shankar Roy entered a caveat opposing the grant of Letters of Administration stating that the Will dated 11-5-83 was forged. The said petition was then numbered as Testamentary Suit No. 19 of 94.

In Testamentary Suit No. 20/84, in support of his case, Capt. Shankar Roy examined himself and attesting witness Philomena Frank Anthony, Edwin Anthony D'Souza and Bhogi Shah have been examined to prove document dated 8th May 1983. Capt. Shankar Roy. Philomena and Dr. Shenoy have-filed their affidavits. In Testamentary Suit No. 19/94, in support of her case, Giselle Misquitta examined herself and her maternal aunt Severina Kumar. Severina Kumar and Gloria Misquitta have filed their affidavits.

As both the suits involved same parties and the adjudication of the dispute depended on the same facts and evidence, the learned Single Judge disposed of both the suits by a common order, which is impugned in the present appeals. By the impugned judgment and order, the learned Single Judge has dismissed both the Testamentary Suits by holding that the execution of both the Wills is not proved.

3. Appeal No. 733 of 1998 arises out of the Testamentary Suit No. 19/94 filed by Miss Giselle Misquitta and Appeal No. 724 of 1997 arises out of the Testamentary Suit No. 20/84 filed by Capt. Shankar Roy.

4. We have heard at length the learned Counsel appearing for both the sides. We have been taken through the entire record and the depositions of the witnesses examined by both sides. The learned Counsel have contended that the Will on which reliance is placed by their respective clients is the genuine Will executed by the deceased.

5. Before we proceed to examine the Will purportedly executed by the deceased on 7-4-83, on which reliance is placed by Capt. Roy, it would be necessary to refer to the observations of the Supreme Court in Smt. Sushiladevi v. Pd. Krishnakumar Misir & others, reported in : AIR 1971 SC2236 where the Supreme Court was examining a Will whereby, bequest was made to a person outside the family of the testator. The Supreme Court observed :

'The fact that the testator had not bequeathed any property to one of his children cannot make the Will invalid. If the bequest made in a Will appears to be unnatural then the Court has to scrutinise the evidence in support of the execution of the Will with a greater degree of care than usual, because every person must be presumed to act in accordance with the normal human behaviour. But, Judges cannot impose their own standard of behaviour on those who execute Wills.'

Therefore though there is no need to assume that all unnatural Wills are suspicious or invalid, while examining unnatural Wills, the Court has to be circumspect and the evidence has to be scrutinised with a greater degree of care than usual.

In the light of the above judgment, we will now examine the Will purportedly executed by the deceased on 7-4-83.

6. Capt. Roy has stated in his evidence that the deceased was a friend of his mother-in-law. She was ill-treated by her daughters and, therefore, she stayed with him and his family for about 15 to 16 months before she expired in 1983. He came to know about the Will of the deceased when it was brought to him by his advocate after her death. He then realised that he was the executor of the Will.

7. We have had a careful look at the said Will Exhibit-A. On the Will, on the right side, at the top and on the left side at the bottom the date 28th August 1981 is typewritten. By this Will, the deceased has disinherited her daughters, sons and their children. She has appointed Capt. Shankar Roy as the executor of the Will. She has bequeathed her property movable and immovable, to Mrs. Aysha Roy, the wife of Captain Roy. The Will is purportedly signed by her. Below her signature, she has put the date 28th August 1981. On the reverse side of the Will the following endorsement is found:

'Signed by the above named Mrs. Maria Rita (Mollie) Desouza, the testatrix, in the presence of both of us present at the same time and who at her request, have signed as witnesses hereto in the presence of the said Mrs. Maria (Mollie) Desouza) and in the presence of each other.'

The attesting witnesses Dr. Shenoy and Mrs. Philomena Rodriques have signed thereunder. However, there is no date put by the attesting witnesses.

8. There is one letter, marked Ex. 'B', dated 8-5-83 on which, Capt. Roy has placed reliance. This letter is addressed to Ayesha Roy, by the deceased. By the said letter, the deceased has authorised Ayesha Roy to carry out her last rites. On the said letter Mr. Bhogi Shah and Mr. Edwin D'Souza have put their signatures.

9. Dr. Shenoy, the attesting witness has not been examined though he has filed his affidavit. In his affidavit, he has stated that the said Will was executed on 7th April 1983 and not on 28th August 1981. He has categorically stated that at the time of the execution of the said Will, the deceased had not subscribed the date

next to her signature and that, this date i.e. 28th August 1981 was added sometime subsequent to the execution of the said Will. The second attesting witness Philomena Rodrigues has also confirmed this in her affidavit. In her evidence, she has stated that the Will was executed in April 1983. When she was confronted with the date 28-8-81 below the signature of the deceased, she has stated that she did not know whether there was a date 23-8-81 below that signature then. From the admissions of both these witnesses, one thing is certain that the Will is tampered with.

The endorsement on the Will to the effect that the deceased and the witnesses had signed it at one and the same time is obviously incorrect, because the Will bears the date 28-8-81. The witnesses have not put any date below their signature and they have come out with a story that it was not signed on 28-8-81 but on 7-4-83. The execution of the Will is therefore suspect.

10. While in the affidavit both the witnesses have made out a definite case that the date 28-8-81 was not there when the deceased had signed the will. In the Court, Philomena was deviated from this stand and stated evasively that she did not know whether the date 28-8-81 was there below the signature of the deceased at the time when she signed the Will.

11. Significantly, the attesting witnesses have not put the date below their signatures. Philomena has stated that she had asked Dr. Shenoy whether she should put the date and he had told her that, it was not necessary. Dr. Shenoy has, in his affidavit, stated that neither he nor Philomena had an opportunity to scrutinize the Will prior to or at the time of the execution of the Will, which might have brought out the discrepancy of the date typewritten on the Will. In the cross-examination, Philomena has stated that while the deceased was signing, she did not look at the contents of the Will. She did not know whether there was any date. At the time of signing or even thereafter, she did not see the date i.e. 28th August 1981, which was type written and handwritten. She did not even see the signature of the deceased. We are unable to accept this story of the attesting witnesses. It is unthinkable that educated persons, who take upon themselves the responsibility of attesting a Will would not have a look atleast at the typewritten date put on the

Will, signature of the maker of the Will and the date put by her below her signature.

In the affidavit Dr. Shenoy has made an effort to explain this discrepancy. He has stated that the deceased had a belief that every Will had to be accompanied by certificate of fitness from a medical practitioner and as she had such a certificate dated 28th August, 1981 she wanted to make a Will of that date. According to him, he had explained to her that the Will was not required to be accompanied by a medical certificate and had advised her against back-dating the Will. He states that the Will was in fact executed on 7th April 1983 in the house of Philomena Rodrique. Implicit in this is the suggestion that the Will was executed actually on 7th April 1983 but the deceased back-dated it because she had a medical certificate date 28th August 1981. To us this appears to be a concocted story.

12. Severina Kumar has stated in her evidence that, on 18-5-83 when she demanded copy of the Will, Advocate Mr. Martis gave her a xerox copy of the Will dated 28-8-81. The said xerox copy is marked Ex. 'H'. Thereafter, on 28-5-83 she received another copy of the said Will. The said Will is marked EX. 'H-1'. If Ex 'H' is compared with Ex 'H-1', it is evident that they are not the xerox copies of the same document. In Ex 'H' the address of attesting witness Philomena is given in 2 lines, while in Ex. 'H-1' the said address is given in 3 lines. If Ex. 'H' and Ex. 'H-1' are the xerox copies of the same document then, there should not be any such variation. This creates a doubt as to, whether the original Will is a genuine document. Everything is shrouded in suspicion. No explanation is coming forward to explain this discrepancy. Advocate Martis would have been the best person to explain this, but he has not been examined.

13. There are some other disturbing features of this Will, which make us suspicious about its execution. Capt. Roy has stated in his examination-in-chief that he did not know anything about the Will and he came to know about its execution two months after the death of the testatrix when Advocate Martis visited his house. In the cross examination he has said that he had never seen or known Mr. Martis before that day. Mr. Martis visited his place in July 1983 and told him about the existence of the Will.

The statement made by Captain Roy that he did not know Mr. Martis till July, 1983 is a blatant lie because admittedly on 14th May, 1983, Mr. Martis made an application on behalf of Mrs. Roy before the Coroner. Having realised the mess he had put himself in by making false statement. Captain Roy admitted that Mr. Martis did make an application before the Coroner on his wife's behalf on 14-5-83. He also admitted that letter dated 28th May, 1983 was addressed by Mr. Martis to Severina Kumar on his behalf. That Mr. Martis was his advocate, is also supported by letter dated 21-6-83 written by Mr. Martis to the State Bank of Mysore on his behalf. He has made a miserable effort to salvage the situation by correcting himself by saying that Mr. Martis had visited him 2 to 3 weeks after the death of the testatrix and not after two months as stated by him earlier.

At one stage Captain Roy has stated that it is only in August/September '83 that he was given a copy of the Will and he had not seen it earlier. Admittedly Mr. Martis has filed the present petition in July, 1983. It is inconceivable that if there was a Will, Captain Roy would not have seen it when the petition was filed.

14. Yet another significant aspect of the matter is that in the application dated 14-5-83, filed before the Coroner, not a word is said about the alleged Will dated 7-4-83, Reference is made only to the alleged letter of the deceased dated 8-5-83, authorising Mrs. Ayesha Roy to carry out the last rites of the deceased. If indeed there was such a Will Mrs. Ayesha Roy was the beneficiary and Mr. Roy was appointed as an Executor, Mr. Martis would have not only referred to it in the application but would have produced a copy of the same before the Coroner because that would have strengthened his application.

15. We also find that the alleged letter/codicil dated 8-5-83 is totally inconsistent with the alleged Will executed on 7-4-83. If by the Will executed on 7-4-83 the deceased had bequeathed all her movable and immovable properties to Mrs. Ayasha Roy, there was no need for her to write a further letter/codicil dated 8-5-1983 leaving one bracelet and earrings to Mrs. Roy and directing her to sell the rest. In the said letter/codicil there is no mention of the alleged Will executed in April, 1983. In our opinion , all these circumstances make this Will suspect. The evidence of Captain Roy and Philomena has no ring of truth. Mr. Martis Advocate

has kept himself away. Dr. Shenoy the attesting witness is not examined. We are, therefore, of the opinion that execution of the alleged Will dated 7-4-83 is not proved.

16. We may now proceed to examine the alleged Will date 11th May 1983 on which, reliance is placed by the grand daughter of the deceased, Gisele Misquitta. We have carefully examined the said Will Exh. 'D'. It is allegedly signed by the deceased and witnessed by Mrs. Severina Kumar and Mrs. Gloria Misquitta, the daughters of the deceased. Though on the right hand side of the Will the date 11th May, 1983 is put, the witnesses have put no date below their signatures.

17. Mrs. Severina Kumar has stated in her affidavit dated 14-5-84 that, her mother's cancer was detected in 1974 and thereafter her behaviour changed. Her friends set her up against her children so that they would get her properties. The deceased was isolated from everybody by Capt. Roy and his wife. On 11th May 1983, they received a call from the Holy Spirit Hospital staff that the deceased was ill. Then Severina Kumar and her sister rushed to the hospital. On 13th May 1983, the deceased informed Severina and her sister that she had made a Will in the name of Severina and the grand children and that, it was in the bank locker. This affidavit was filed in Testamentary Suit No. 20/84 filed by Capt. Roy. When the said suit was part-heard, Mrs. Severina Kumar filed another affidavit dated 29th July 1992, stating therein that, in or about April 1992, they had found a Will dated 11th May 1983 executed by the deceased. It was witnessed by her and her sister Gloria. A copy of the said Will was found by her and her sister while searching the personal effects of her late brother Vernom D'Souza and on account of the discovery of the said Will, Suit No. 20/84 filed by Capt. Roy had become infructuous because that was the last Will and testament of the deceased.

18. In our opinion, Severina Kumar is a totally unreliable witness. There is no consistency in the averments made in both her affidavits and her evidence in the Court. In her affidavit dated 14th May, 1984, she has stated that her mother had told her in the hospital on 13th May 1983, that she had left a Will in the name of her daughter and grand children and that, it was in the bank locker. In the affidavit dated 29th July, 1992, she has stated that they had found a Will dated 11th May,

1983 executed by the deceased while searching the personal effects of her brother Vernom and that, the will was witnessed by her and her sister Gloria. In the Court, however, she has stated that, on 11th May, 1983, in the hospital, her mother took out a Will, signed it and she and her sister Gloria signed therein as attesting witnesses.

If, her version in the affidavit dated 14th May 1984 to the effect that the deceased had told her on 13th May 1983 in the hospital that the Will was in the bank locker was true, there was no question of the deceased taking out the will on 11th May, 1983 in the hospital and asking Severina and her sister to sign on the same as attesting witnesses, The affidavit dated 29th July, 1992 makes out a completely new story that, the Will was found in the personal effects of Vernom in or about April 1992. Moreover, if Severina Kumar and Gloria are the attesting witnesses to the said Will, in her affidavit dated 14th May 1984, Severina ought to have referred to the said Will. Not a word is said about this in the affidavit dated 14th May 1984. A Vague statement is made that the deceased had told her that a Will was made and that, it was lying in a locker. Absence of any reference to the alleged Will in her first affidavit dated 14th May, 1984 makes her testimony suspect. Even Giselle Misquitta has stated in her evidence that, in April 1992, her mother Gloria handed over a Will left by her grand-mother to her and then she filed the petition. There is no explanation as to, why if the alleged will was executed on 11th May 1983 and was attested, by Severina Kumar and Gloria. Gloria had not disclosed this fact to her daughter Giselle earlier. The enormous delay of 2 years in bringing this story about the alleged Will dated 11-5-83 on record makes us conclude that, the said Will is a got up Will, intended to be used as a counterblast to the Will on which Capt. Roy has place reliance. We, therefore, held that the execution of the Will dated 11-5-83 is also not proved.

19. So far as the codicil/letter dated 8-5-83 is concerned, as already observed by us, the contents of this document are not consistent with the contents of the Will allegedly executed on 7-4-83. The witnesses who have attested the said letter do not inspire confidence. They have not put any date below their signatures. Mr. D'Souza has stated that on 8-5-83 the deceased met him on the road and requested him to come to Mr. Shah's house. Mr. D'Souza is not a person, who

was very closely acquainted with the deceased. Therefore, it is unnatural for the deceased to tell Mr. D'Souza, that too on the road, to come to Mr. Shah's house at the time of execution of the alleged codicil. Similarly, it is also unnatural that deceased would go to Mr. Shah's house for executing the alleged codicil. In our opinion, examined in the background of all the circumstances, this letter/codicil dated 8-5-83 also appears to be a suspicious document.

20. We therefore concur with the learned Single Judge when he says that execution of both the Wills and the codicil/letter dated 8-5-83 is not proved. Both the suits have been rightly dismissed. The appellants have not made out any case for interference with the impugned judgment and order.

21. In the result, Appeal No. 724 of 1997 and Appeal No. 733 of 1998 are dismissed.

22. Appeals dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com