

A. Chandrabati Vs. Laxmi Dei

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Court : Orissa

Decided On : Mar-18-1991

Reported in : AIR1991Ori289; 1991(I)OLR415

Judge : A. Pasayat, J.

Acts : [Succession Act, 1925](#) - Sections 59, 63 and 283; [Evidence Act, 1872](#) - Sections 3, 45, 67 and 68

Appeal No. : First Appeal No. 381 of 1981

Appellant : A. Chandrabati

Respondent : Laxmi Dei

Advocate for Def. : B.H. Mohanty, ;J.K. Bastia, ;S.C. Mohanty and ;H.H. Swain

Advocate for Pet/Ap. : Dev Anand Misra, ;Deepak Misra and ;R.N. Naik

Disposition : Appeal allowed

Judgement :

A. Pasayat, J.

1. Letters of Administration in respect of a Will alleged to have been executed by one A. B. Anajee having been granted in favour of one Shrimati Laxmi Dei, her sister-in-law has come before this Court for relief.

2. This is second journey of the parties to this Court in the following background.

A. B. Amajee (hereinafter described as 'the testatrix') is the daughter of one E. Kanhaya whose sister is A. B. Amadu. The said A. B. Amadu is the grandmother of A. Bhaikar Rao and Laxmi Dei. A. Bhaskar Rao's sister Laxmi and widow A. Chandrabhati are the contesting parties. According to Laxmi (also described as 'the propounder'), a Will was executed by the testatrix on 17-2-1957 stipulating inter alia that after the death of A. B. Amajee, Laxmi and A. Bhaskar Rao shall get the properties. It contained a further stipulation that if any of the legatees died without leaving behind any son or daughter, the properties would go to the other legatee. A Bhaskar Rao died on 19-9-1974 issueless and hence Laxmi put claim to enjoy the entire properties, since Amajee had died earlier on 12-8-1957. According to Laxmi, after the death of Amajee, both she and her brother were possessing the bequeathed properties and on the death of A. Bhaskar Rao, her brother, she wanted the properties to be recorded in her name. In absence of grant of letter of administration in her favour, she was unable to do so and, therefore, she moved the District Judge, Cuttack for grant of letters of administration. Her claim was stoutly resisted by Chandrabati on the ground that the Will was not genuine, but a forged one and the signature purporting to be that of Amajee was not her and the document was created with the object of grabbing the properties of Amajee and depriving Chandrabati of her legal entitlement.

Four issues were framed. The issue that is vital relates to the genuineness of the Will, its due attestation and execution. Initially the suit was dismissed on 28-7-1977 on the finding that the Will was not genuine and not duly executed and attested. This Court in First Appeal No. 241 of 1977 set aside the judgment and remanded the suit with a direction that the original Court should give an opportunity to the applicant-plaintiff to get the disputed signature in the Will examined with the admitted signature of the testatrix by a handwriting expert and grant opportunity to the parties to adduce evidence by examining the handwriting expert who had the opportunity of comparing the signatures, or any other expert and to dispose of the suit on the evidence on record. The signatures were sent for the opinion of P.W. 5, the expert and he was also examined. On evaluation, the trial Judge came to hold that the Will was genuine and was duly and properly

executed, and the applicant was, therefore, entitled to a letters of administration.

3. Mr. Deepak Misra, learned counsel appearing for the appellant, submits that in a case of this nature, what is important is to find out truth. According to him, the peculiarity of the Will, age of the beneficiary and the conditions stated in the Will appear to be so illogical that a prudent man cannot accept the Will to be genuine; the very fact that the Will was sought to be probated after twenty years shows non-genuineness of the Will; the burden is on the propounder and on the scanty evidence which is contradictory and inconsistent, the original Court should not have granted the letters of administration; conduct of the propounder clearly goes to show that the Will was not in existence at the time of death of Amajee and was a manufactured and fabricated document; the evidence has not been properly scrutinised and attestation and execution as mandatorily prescribed to be proved in the case of a Will has not been so done.

The respondent, however, submitted that the attesting witnesses were close relations and there is nothing suspicious or mysterious about the Will, as the properties were not intended to go out of the family; the restrictions which were imposed by the testatrix were reasonable; the expert's evidence clearly proves that the Will was genuine and there was no infirmity attached thereto and the evidence has been carefully scrutinised, proper conclusions drawn and there is no scope for interference. It has also been submitted that merely because the expert did not know the language in which the signature of the testatrix appears in the Will, it cannot be discarded as unreliable.

4. The contentions need careful consideration. As observed by the Supreme Court in *Venkatachala Iyengar v. Thimajamma*, AIR 1959 SC 443, the party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved with reference to the statutory provisions which govern the proof of documents, Sections 67 and 68 of the Evidence Act are relevant for the purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act, the opinions of experts and of persons acquainted with the

handwriting of the person concerned are made relevant. Section 68 deals with the proof of execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions are prescriptive requirements and indicate the nature of proof which must be satisfied by the party who relies on a document. Similarly Sections 59 and 63 of the Succession Act are relevant. While the former section provides about disposition of property by a person of sound mind by Will, the latter requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence or by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the will shall be attested by two or more witnesses as prescribed.

5. The further question that emerges is, did the testator really understand the nature and effect of the dispositions in the Will Did he put his signature to the Will knowing what it contained? The decisions of these questions really determine the nature of the findings on the question of proof of Wills. A distinguishing feature which distinguishes Wills from other documents is that unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed from the world cannot say about its genuineness, contents etc. The onus, therefore, becomes heavy on the propounder to show by satisfactory evidence that the Will was signed by the testator who at the relevant time was of sound and disposing state of mind, understood the nature and effect of the disposition and put his signature to the document of his own free Will. Judging the solemnity attached, the evidence should be of disinterested, satisfactory and sufficient nature. By and large suspicious circumstances surround the execution of a Will and, therefore, it is necessary for the Court to see that all legitimate suspicions are removed before the document is accepted as the last Will of the testator. Naturally the Courts start with suspicion and the presence of such suspicious circumstances tend to make initial burden very heavy and unless it is satisfactorily discharged, Courts would be reluctant to grant the prayer of the propounder. It is true that, if a caveat is filed by a caveator alleging fraud, undue influence or coercion etc. in respect of the

execution of the Will propounded, such pleas may have to be proved by the caveator; but nevertheless in the absence of such pleas also the propounder has a burden of proving the initial onus to remove any such legitimate doubts in the matter. Time and again this view has been laid down by the Supreme Court, See AIR 1977 SC 74, Jaswant Kaur v. Amrit Kaur. The elaborate review of the position is made in Venkata-chala Iyengar's case (supra) and six propositions were laid down which have been reiterated by the Supreme Court in Jaswant Kaur's case (supra), in the following words (at page 77):

'In cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What generally, is an adversary proceeding becomes in such cases a matter of the Court's consciences and then the true question which arises for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the Will duly offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.'

A Will is one of the most solemn documents by which a dead man entrusts to the living, the carrying out of his wishes, and in view of the very fact that he cannot be called either to deny his signature or to explain the circumstances under which it was executed, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary requirement of law. No specific standard of proof can be laid down and circumstances of the particular case under consideration would be the determinative factor.

6. Before scanning the alleged suspicious circumstances, it would be necessary to first find out whether the statutory requirements under Section 63 of the Succession Act relating to attestation of a Will have been complied with in the background of Section 68 of the Evidence Act. Section 68 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the

Court and capable of giving evidence. Section 63 of the Succession Act bestows that a Will has to be attested by two witnesses. Therefore, Section 68 makes an important concession to those who wish to prove and establish a Will by permitting proof by only one attesting witness being called. The essential conditions of a valid attestation are that two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature and with a view to attest or to bear witness to the fact each of them has signed the instrument in the presence of the executant. As observed by the learned author Jarman in his *Illustrious Book Jarman on Wills*, 8th Edition, in every case the Court must be satisfied that the names were written *animo attestandi* and that the witness has put his signature *animo attestandi*, that is for the purposes of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. In the instant case, according to the propounder, P.W. 3 is the attesting witness. His evidence is of significance because he claims to have heard the instructions of Amajee, the testatrix. According to him, the instruction which was incorporated in the Will to the effect that testatrix would possess the properties during the lifetime and after her death Laxmi and Bhaskar Rao would possess the properties, and after them children of either of them who would be existing then would possess it. This statement corrodes the entire basis of the propounded claim, which is otherwise. Though this by itself may not be sufficient to throw out the claim of the propounder, there are certain factors which need to be highlighted. Strong reliance has been placed by the propounder on P.W. 5, the handwriting expert's evidence. The stand of the respondent is that the expert need not know the language in which the signature of the testatrix is made. There can be no quarrel with this proposition. The real function of the expert is to put before the Court all the materials together with reasons which may induce it to come to a definite conclusion. The Court although not an expert may form its own judgment by its own observation on those materials. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity or dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence. See AIR 1979 SC 14 : 1979 Cri LJ 17, *State (Delhi Administration) v. Pali Ram* at

paragraph 38, page 21. Similar view was also expressed by the Supreme Court in AIR 1967 SC 1326 : 1967 Cri LJ 1197, Fakhruddin v. State of Madhya Pradesh, where it was observed that the Court must see for itself after the expert's opinion is given and with the assistance of the expert come to its conclusion whether it can safely be held that the two writings are by the same person. It was observed that this is not to say that the Court must play the role of an expert, but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion, whether of the expert or other witness. I do not find the expert's evidence to be consistent, because at paragraph 9 of his cross-examination he has stated that in his report he had stated about the similarities, and dissimilarities as well. But the report marked as Ext. 4 does not contain indication of any dissimilarity. I have myself compared the signatures appearing in the alleged Will with those contained in the specimen signature register, entry No. 36227 (Ext. 2). I notice some peculiar features; the first being that the ink used for making the alleged two signatures appearing in two pages in the Will appears to be different. There is marked variance in the writings in the two signatures. While the signature on the first page is made with a thick nib, the one used for the signature in the second page of the Will is thin as is evident from the letters of the signatures. The letters 'AA', 'KA', 'EO', 'E', 'NA', and 'MA' have been differently scribed in the signatures. This is a very suspicious circumstance. If the two signatures in the two pages of the Will vary so substantially, their comparison with the entry in specimen register loses significance. It is surprising that the expert has not noticed those peculiar features. He also does not appear to have considered that there were two signatures in the Will. Everywhere he appears to have referred to only one of the signatures which is apparent from data No. 2. He has referred to the letters in the two sets. Indubitably there were three sets of handwriting, i.e., two sets on the Will, and one in specimen signature register. He does not appear to have compared the two signatures appearing in the Will itself. The differences are apparent even to the naked eye. As observed in AIR 1972 Pat 146, Harihar Prasad v. Bhagwan Das, difference in ink might not be a matter of serious suspicion, but even then it has to be explained. The circumstances in which two different pens were used have not been satisfactorily explained. It is one of the suspicious circumstances which has contributed to the incredibility of

the propounder's claim.

Another aspect which needs consideration is the long gap after which the Will was produced. As has been observed by the Privy Council in *Mst. Biro v. Atma Ram*, AIR 1937 PC 101 : 1937 ALJ 462, where the Will has not been produced for many years and specially when it practically disentitles a person substantially, doubt in genuineness arises. Even if delay in producing the Will for probate does not by itself militate against its genuineness, but when it is not acted for long, and was not produced at times when its production was warranted, it is a suspicious circumstance against the genuineness of the testament. As observed by various Courts strict proof of execution of the Will is called for when delays clubbed with factors which throw doubts on its genuineness, and when the testator is illiterate and suspicious circumstances bristle. See AIR 1922 PC 409 : *Balkuntha Nath v. Prasanna Moyi Dabya*, AIR 1939 Cal 535, *Harimathi Devi v. Anath Nath Roy*.

7. The cumulative effect of the circumstances indicated by us leans heavily in favour of a conclusion that the Will was not genuine. The decision of the learned Additional District Judge cannot, therefore, be sustained. The judgment and decree passed by the Court below are set aside and the appeal is allowed. The application filed by the respondent under Sections 276 and 278 of the Succession Act deserves rejection, which I hereby direct.

There shall be no order as to costs.

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