

Rabindra Kumar Dash and anr. Vs. Smt. Banalata Dash Alias Devi and anr.

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Court : Orissa

Decided On : Nov-22-1999

Reported in : 2000(I)OLR9

Judge : P.K. Misra, J.

Acts : [Evidence Act, 1872](#) - Sections 68 and 71; [Indian Succession Act, 1925](#) - Sections 59, 63 and 281

Appeal No. : First Appeal No. 48 of 1990

Appellant : Rabindra Kumar Dash and anr.

Respondent : Smt. Banalata Dash Alias Devi and anr.

Advocate for Def. : Susanta Kumar Dash, S.K. Misra, B. Mohapatra and S.K. Dash (R-1)

Advocate for Pet/Ap. : M.M. Sahu and A. Samantarai

Disposition : Appeal dismissed

Judgement :

P.K. Misra, J.

1. Defendants 1 and 2 have filed this appeal against the decision of the Subordinate Judge granting probate in respect of the Will executed by deceased

Haripriya Dash.

2. Plaintiff is the only daughter of the deceased, whereas the two appellants are his sons. It was pleaded in the application that the testator executed a registered Will on 22.4.1968 in favour of the plaintiff being satisfied with the services rendered by the plaintiff during illness of the testator. It was further claimed that the Will was attested by the defendants (the two sons of the deceased). The Will was in respect of only one item of property belonging to the testator.

3. Objection was filed on behalf of defendants 1 and 2 who denied the allegations in the application. It was claimed that the Will was obtained by exercising undue influence and coercion on deceased Haripriya. It was further stated that the Will had not been properly attested.

4. The widow of the deceased who had been arrayed as defendant No. 3 did not file any written statement, but supported the claim of the plaintiff on being examined as P.W. 3. Besides examining her mother, the plaintiff examined herself as P.W. 1 and two other witnesses as P.Ws. 2 and 4 respectively. Defendant No. 1 was examined as O.P.W. 1 and two other witnesses were examined on behalf of the contesting defendants.

5. On the basis of the pleadings, the following issues were framed:

'1. Is the suit as laid maintainable ?

2. Is the Will in question duly executed by testator and attested by the witnesses ?

3. Was the testator in sound state of mind and health at the time of executing the Will ?

4. To what relief, if any, is the plaintiff entitled ?

5. Is the Will in question genuine and valid ?'

6. Considering the main two Issues, namely Issues Nos. 2 and 3, the trial Court held that the Will had been duly executed by the testator in sound state of mind and had been duly attested. Under Issue No. 5, it was held that there was no

undue influence, nor coercion and the Will was genuine and valid. On the aforesaid findings, the trial Court allowed the application for probate.

7. In this appeal, it is contended that the application for probate had not been presented properly and had not been verified as required Under Section 281 of the Indian Succession Act. In this context, it is submitted that the application for probate should have been verified by at least one of the witnesses to the Will, as required Under Section 281.

8. The relevant provision of Section 281 of the Indian Succession Act is as follows :

'281. Verification of petition for probate by one witness to Will -Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the Will (when procurable) in the manner or to the effect following, namely.....'

In the present case, the petition had not been verified by any of the attesting witnesses. The question is whether such non-verification by any of the attesting witnesses can be considered as a valid ground to dismiss the application for probate. It is the admitted case of the plaintiff that the Will had been attested by the two sons of the deceased, who are the main contestants being defendants 1 and 2. The proceeding for probate had to be filed as dissension arose in the family. In the above back- ground, it would have been futile on the part of the plaintiff to expect that the application for probate would be verified by any of the two sons who were, in fact, the main adversaries of the plaintiff. The use of the expression 'when procurable' in Section 281 is itself indicative of the fact that the provision regarding verification as contained in Section 281 is directory and not mandatory and as such omission to verify cannot be considered as fatal. Where the attesting witness is not procurable, it cannot be expected that the petition has to be verified in the manner indicated in Section 281. Similar view has been expressed in the decisions reported in AIR 1958 Allahabad, 329 (Nand Kishore Rai and Anr. v. Mst. Bhagi Kuer and Ors.) and AIR 1923 Nagpur, 41 (Ramasinha Rajput v. Murtibai). As such the first contention raised by the appellants cannot be sustained.

9. The learned counsel for the appellants raised a more formidable ground of attack by contending that the Will in question could not have been used in evidence without complying with the provision contained in Section 68 of the Evidence Act. It is contended that a Will is required to be attested as contemplated in Section 63 of the Indian Succession Act and for proving such a Will, at least one of the attesting witnesses was required to be called for proving the execution of the Will. Such a contention raised before the trial Court was negated by holding that since the two attesting witnesses were the main adversaries of the plaintiff and they had denied about the valid attestation of the Will and were themselves challenging the due execution of the Will, the Will could be proved through evidence of other witnesses, as contemplated in Section 71 of the Evidence Act. Such finding of the trial Court is vehemently challenged by the counsel for the appellants.

10. In order to appreciate the submissions made by the counsels for parties, it is necessary to extract the relevant provisions contained in Sections 68 and 71 of the Evidence Act :

'68. Proof of execution of document required by law to be attested -

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 :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

71. Proof when attesting witness denies the' execution:

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.'

11. There is no doubt that in the present case, the execution of the Will had been denied by the defendants. The execution of the Will and attestation thereof is sought to be proved through plaintiff herself. The learned counsel for the appellants has contended that since the plaintiff had not called any of the attesting witnesses to prove the execution of the Will, such document could not have been admitted into evidence. In this context, he had submitted that merely because the attesting witnesses were likely to deny about the execution or attestation of the Will, cannot be considered to be a ground not to call any of the two attesting witnesses who were admittedly alive. He has relied upon the decisions reported in AIR 1941 Oudh 89, (Kali Charan v. Suraj Bali and Ors.) : AIR 1976 Andhra Pradesh 370 (Bandaru Veeramma and Ors. v. Chirravuri Ramakrishna Sarma and Ors.) : AIR 1974 Ori. 170 (Harish Chandra Sahu and Anr. v. Basant Kumar Sahu and Ors.) : AIR 1981 Madras 252 (Pattammal and Anr. v. Kanniammal and Ors.) : AIR 1965 Kerala 32 (Punnakkal Konnu's daughter Ammu v. Thekkekkara Kunhunni's son Krishnan and Ors.) : AIR 1949 Bom 266 (Vishnu Ramkrishna and Ors. v. Nathu Vithal and Ors.) in support of such contention. In none of the aforesaid cases, the adversaries of the party seeking to prove the execution of the document were the attesting witnesses and had already denied about the execution of the document in question. Section 68 of the Evidence Act has been incorporated evidently with a view to produce best possible evidence in support of the case of a party. However, Section 71 is considered to be an exception to Section 68. Where the attesting witness denies about the execution of the document, such document can be proved through other witnesses as contemplated in Section 71. The expression 'if the attesting witness denies' is not confined to 'denial' while deposing in Court as a witness, but includes denial if contained in the written statement, as in the present case. In the present case, the two attesting witnesses had already denied about the execution/attestation of the document in the shape of their verified objection filed in the probate proceeding. In the decision reported in AIR 1941 Oudh 89 the attesting witness had not been called as a witness on the supposition that he had turned hostile. In the aforesaid context, it was observed that the party could have called such witness and if he would not have proved about the execution of the document, the party could have cross-examined such witness with the permission of the Court. In the decision

reported in AIR 1976 Andhra Pradesh 370, the attesting witness had not supported the ease of the party calling him as a witness and was permitted to be cross-examined and it was observed that the execution could be proved through other evidence. The observations made in the aforesaid two decisions cannot be extended to a case where the attesting witness being the adversary party has already denied about the execution/attestation in the written statement. As already indicated, in the present case, the two attesting witnesses having already denied about the execution/attestation it was open to the party relying upon the Will to prove execution including attestation through other evidence.

12. The next question is as to whether the plaintiff has proved the due execution of the document. Due execution of the Will includes within itself attestation of the Will, as contemplated in Section 63 of the Succession Act. In the present case, the plaintiff has proved that the Will was duly executed by her father in presence of herself and her two brothers. It is further proved that the two sons of the testator attested the Will. It has been elicited in evidence :

'20.....At the time of signing the Will by my father, my mother. two brothers, Chakradhar Das and myself had seen him signing. The two brothers are the attesting witnesses who signed after seeing the execution by my father. They have also signed in the Will.'

Though the defendants claimed that they had signed the Will as attesting witnesses under coercion and undue influence, there is no acceptable evidence to indicate that there was no due attestation. The widow of the deceased who was also likely to be deprived of the property has supported the due execution of the Will. She being the mother of the plaintiff as well as defendants 1 and 2, her evidence supporting the case of the plaintiff carries more weight.

13. The defendants had taken the plea that the Will was executed by the deceased under undue influence and coercion. However, such a plea has not been proved by the defendants by adducing any cogent evidence.

14. It is, of course, true that a propounder under the Will has to remove all suspicions regarding genuineness of a Will. In the present case, the propounder

herself was present at the time of execution of the Will, but as observed in the decision reported in AIR 1972 Pat. 146 (Harihar Prasad Sao v. Bhagwan Das and Ors.) that by itself cannot be taken to be a sufficient ground to discard the Will when it appears to be otherwise genuine. The plaintiff was the only daughter of the testator. The giving of a house site inside Cuttack Town to the married daughter by executing a Will cannot be considered to be unnatural. The fact that the Will was duly registered can be considered as a circumstances indicating the genuineness of the Will particularly in the absence of any suspicious circumstance, as observed by the Supreme Court in the decision reported in AIR 1962 Supreme Court 567 (Rani Purnima Debi and Anr. v. Kumar Khagendra Narayan Deb and Anr.).

15. It is contended by the counsel for the appellants that the evidence on record itself indicates that the testator himself was trying to sell away the property even to the knowledge of the plaintiff. According to the counsel for the appellants such conduct of the testator was indicative of the fact that he had no real intention of giving the property to the daughter by way of Will. It is well known that a Will always takes effect after the death of the testator and even after executing the Will, the testator had all powers to alienate the property. Merely because the testator was trying to alienate the property even with the active assistance of the plaintiff cannot be considered as a ground to hold that the Will had been obtained through coercion and undue influence. On the other hand, since the Will had been executed in presence of the plaintiff as well as the two sons, it is quite probable, as observed by the trial Court, that the testator was trying to sell away the property with a view to give the consideration amount to the daughter.

16. During the trial, plea had been taken and evidence had been adduced relating to alleged family settlement after the death of the testator. It is submitted at the Bar that another litigation is pending before the trial Court relating to the properties and the question of the alleged family settlement is to be decided in the said suit. Any observation made by the trial Court in the present probate proceeding relating to validity or invalidity of the alleged family settlement is of no consequence. Law is well settled that in a probate proceeding, the Court is only required to find out about the due execution of the Will and it is not concerned with the other related matters including title of the testator to the property. It is thus made clear that only

the genuineness of the Will has been found in the present proceeding and all other questions are left open.

17. For the aforesaid reasons, I do not find any merit in this appeal, which is accordingly dismissed subject to observations made above. There will be no order as to costs.

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