

Billeswar Kumar Vs. Smt. Nirupama Debi and ors.

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Court : Kolkata

Decided On : Mar-28-1973

Reported in : AIR1973Cal460

Judge : A.K. Sinha and ;N.C. Mukherji, JJ.

Acts : [Succession Act, 1925](#) - Sections 59 and 63

Appeal No. : A.F.O.D. No. 313 of 1964

Appellant : Billeswar Kumar

Respondent : Smt. Nirupama Debi and ors.

Advocate for Def. : M.N. Gosh, ;J.K. Banerjee and ;Ajit Kumar Basu, Advs.

Advocate for Pet/Ap. : Bhabesh Chandra Mitter and ;Aruna Mukherjee, Advs.

Disposition : Appeal dismissed

Judgement :

A.K. Sinha, J.

1. This appeal is preferred by the plaintiff appellant against a judgment and decree of the Trial Court refusing grant of probate briefly in the circumstances as follows:

2. The appellant made an application in the Court of the District Judge, Malda for grant of probate of a Will of one Rajes-wari Debya. The case set up by the appellant briefly was that Rajeswari Debya died on or about 29th December, 1956, at the residence of her daughter Sushamabala Debya at Khaskhole in the district of Malda leaving considerable amount of the immovable properties described in the Affidavit of Assets as also her near relations namely two daughters -- Sushamabala and Nirupama and their several sons and daughters. The Will was duly executed on 16th Agrahayan 1363, B. S. corresponding to 2nd December, 1956. The testatrix at the time of her death, it is alleged, had a fixed place of abode at Khaskhole. The appellant a son of Sushama was appointed executor in the Will and there being no other application for probate or for letters of administration, he was entitled to the grant of probate of the Will.

3. The proceeding on the objection by the other daughter Nirupama of the testatrix appeared as a contentious cause and in the written statement filed by her, apart from the general denial of all allegations made in the application, it was alleged that the Will was set up as a counter-blast to the partition suit already filed by her after the death of Rajeswari Debya who lost her mental balance long before the date of execution of the Will. She had no sound disposing mind and was completely under the control of Sushama and her sons and daughters and Sushama's son-in-law Byomkesh Pandey, all of whom conspired to grab her entire properties and thus to deprive Nirupama of her legitimate share of the properties left by her mother. As Billeswar, it is further alleged, was most intelligent and shrewd person amongst Sushama's sons, he has been set up as an executor in the Will and has now made an application on entirely false and frivolous allegations for grant of probate of the Will.

4. Upon these pleadings two issues were framed, first, as to whether the will was duly executed and attested and secondly whether the testatrix had testamentary capacity to execute the Will. The propounder examined 9 witnesses including himself and two witnesses were examined on behalf of the first respondent. Learned Court below on the basis of a copy of the Will as the original was lost to which we shall come presently, found on evidence that the Will was neither duly executed and attested nor the testatrix had the testamentary capacity to execute

the Will and accordingly dismissed the application for probate. That is how in short the appellant being aggrieved has preferred the present appeal.

5. The most unfortunate and no less serious part of the matter in this case is that the original Will which was unregistered was lost or mislaid under strange circumstances. At the instance of the appellant, the learned District Judge, it appears, sent for the examination of the thumb impression of the testatrix, though the genuineness of the thumb impression was not in issue specifically, to the Anderson House at Alipore District 24-Parganas for the opinion of the Government Finger Print Expert. Along with the Will a power of Attorney admittedly executed by Rajeswari in favour of husband of her second daughter Nirupama and since cancelled was sent for comparison. Thereafter as appears from the Order No. 66 passed on 3-2-62, 9 days after the receipt of the acknowledgment of the cover containing the Will and the Power of Attorney, the Deputy Inspector General of Police, C. I. D. by his letter dated 1-12-61 informed the learned District Judge 'that the disputed Will in 3 sheets in a sealed cover does not appear to have been received. Only 4 sheets of Ammukhtearnama have been received in a registered cover.' Thereupon a preliminary inquiry was held by the District Judge and as stated by him after giving his reasons in the same order dated 3-2-62 he was of the opinion that the original Will must have reached its destination and had been thereafter taken away by some designing person. Then he directed for giving information to the parties about the missing of the Will and asked them to get ready with evidence. The learned District Judge, it appears, however, from the same order asked the appellant to lodge information with the Police about missing of the Will but there is nothing on record to show that the appellant took such steps. We think, however, that the procedure as adopted by the learned District Judge for tracing the missing Will was not correct. The learned District Judge, we think, was not powerless to direct the Police to make a thorough inquiry into the matter and then on receiving report of the Police and after taking such further or other evidence as might have been necessary should have given his opinion in the matter. There may be more than one reason to suspect either of the parties in the present proceeding to get the original Will removed with the help of the employees either in the Court of the District Judge or in the Anderson House who were left, for the time being, in charge of the Will. It is, however, very curious that the appellant

who was most interested in the recovery of the original Will neither lodged any information to the Police nor moved this Court against the order passed by the learned District Judge who decided to dispose of the entire probate proceeding only on the basis of the copy of the Will. The appellant, as appears, even after the present appeal was preferred on 6th May, 1963, did not move this Court for a proper and necessary inquiry into the matter for dissolving the mysterious disappearance of the original Will. On the other hand, he has allowed time to run out for about 10 years with the result, that the evidence which might have been available in 1963 were permitted completely to be wiped off by sheer lapse of time. At this distant date, it is futile to trace the missing Will which must be held to have been lost.

6. The learned District Judge, however, proceeded to consider the question of grant of probate on the basis of a copy which was prepared and preserved when the original Will was deposited in the Court, on application of Section 237 of the Indian Succession Act. But this section, as appears, is applicable to cases of grants of limited duration that is the grant is to remain in effect until the original or the properly authenticated copy of the Will is produced. It is not necessary for our present purpose to decide whether the copy so preserved is an authenticated copy for even on the basis of copy genuineness, due execution and attestation of the original Will or the testator's capacity to execute the Will must have to be proved for obtaining grant of probate, even though limited in duration. Now, apart from the two issues framed, it appears that after the evidence was closed an application was made on behalf of the first respondent to frame another issue raising question as to genuineness of the Will but this application was not allowed. But we think such an issue in the facts and circumstances of the present case ought to have been framed and the learned District Judge should have determined the question of genuineness of the Will after giving fresh opportunities to the parties. At this distant date, it will not be fair and proper to remand the case back for trying such an issue, for, by sheer lapse of time evidence on either side may have been blotted out. We therefore proceed to dispose of this appeal confined to those two issues only.

7. The learned District Judge, as appears, before entering into the question of due execution and attestation recited briefly the history of the family of the testatrix as also of her two married daughters where-from it appears that the husband of the eldest daughter Sushama who used to stay in the house of his mother-in-law committed suicide in or about the year 1936. He had 4 sons of whom Billeswar, who is the third, is the present appellant and also two daughters Pronita and Smriti, the eldest of whom was married to Byomkesh Pandey P. W. 5 and Biswanath, the fourth son, had two sons named Sapan and Tapan. These persons are more or less interested in the Will as the testatrix appears to have made bequest of some properties in their favour. Nirupama, the youngest daughter of the testatrix who was married to a now highly placed Government official in the State of Bihar named Par-meswar Singh had also three sons and one daughter but excepting Nirupama who was given 8-Annas share only in a portion of the entire properties left by the testatrix none of them got anything under the Will. In the Will she has also created Debottar estate in respect of certain part of her properties and appointed 3 sons of Sushama as She-baits. In this background, on the first issue as to the execution of the Will, the learned District Judge on assessment of evidence adduced by the appellant found that the pro-pounder failed to prove the due execution and attestation of the Will in question. On a review and re-assessment of evidence adduced in this case we cannot take any view different from the view taken by the learned District Judge. Before we give our reasons we must record that an application with a certified copy of a petition dated 29-11-72 filed in the partition suit along with certain other documents was filed in this appeal for taking additional evidence which, it was alleged, was necessary for effective determination and for giving our judgment in this case. On a comparison of the original petition with the certified copy it was, however, detected that there were interpolations at several places in the certified copy obviously made by the applicant (vide our order dated 19-2-73). Mr.Mitter on behalf of the appellant, however, ultimately did not press this application. We shall, however, deal with this application separately to consider the question of interpolation of the documents annexed to this application and to see whether the appellant ought to be proceeded against for committing any offence for producing or for using such a document in evidence in a judicial proceeding.

8. Now, advertent to the evidence, although the learned District Judge elaborately dealt with the letter Exhibit 5 produced by the appellant to show that immediately after the execution of the Will Billeswar Pandey was informed by Byomkesh that he was appointed executor and she wanted to know whether he was agreeable to his appointment as such executor, he did not rely upon this letter. Apart from the reasons given by the learned District Judge, the letter seems to be curious and opposed to normal course of human conduct, for, if the testatrix already appointed Billeswar as executor, we fail to see how again she would like to know whether he was agreeable to accept the executorship. If she was keen over the acceptance of the office of executor by Billeswar in normal course of things he ought to have been consulted first and not after execution of the Will. So, if we consider this aspect of the matter together with the reasons given by the learned District Judge, it seems clear that this letter was brought into existence only with intent to create evidence. The learned District Judge, however, did not rely upon this letter, for very rightly he concluded that this letter even if it was true, could not prove the execution and attestation of the Will. Even so, this letter cannot be brushed aside for the letter which, as found by the learned District Judge, we think properly, is created Would no doubt establish one of the suspicious circumstances surrounding the execution of the Will.

9. This apart, on a fair reading of the evidence of the lawyer P. W. 3, Byomkesh Pandey P. W. 5, Billeswar the appellant and also the writer P. W. 6 serious discrepancies are found regarding instructions given for making the draft of the Will, the time of writing the Will, sitting arrangement where the Will was said to be executed, supply of ink for taking thumb-impression and the manner and mode of attestation and execution of the Will. Mr. Mitter on behalf of the appellant has contended before us that the lawyer who drafted the Will came to the Witness Box to depose that the draft was prepared by him. He is old, senior and experienced lawyer of the Bar and because he had discontinued keeping of the clerk or did not pay any Income-tax, his evidence should not have been disbelieved by the learned District Judge. We think, however, apart from those questions, the evidence of the lawyer is that he prepared the draft on receiving instructions from Byomkesh and not from the testatrix. Byomkesh however, tried to improve upon the evidence of the lawyer and stated that on the next day the testatrix went to the house of the

lawyer which, however, is not his evidence. Byomkesh P. W. 5 appears really to have taken the leading role in the preparation of the Will but he contradicted the lawyer on vital points regarding the preparation of the draft and also the schedule attached to the Will. There is also discrepancy regarding the presence of lawyer at the time of execution of the Will. The lawyer himself stated that he had never been to the house at Khaskhole whereas P. W. 9 said that another pleader of Malda was also sitting by the side of Rajani Kanta Das, P. W. 6. It is unnecessary in the facts and circumstances of this case to find out each and every discrepancy on vital matters regarding execution and attestation of the Will in the statements of various witnesses examined on behalf of the appellant. It would be sufficient to say that the various discrepancies noticed by the learned District Judge with which we entirely agree establish a number of suspicious circumstances surrounding the execution of the Will and clearly the appellant failed to remove those suspicions by cogent and clear evidence and satisfy the conscience of the Court regarding due execution and attestation of the Will.

10. Mr. Mitter has however, contended that execution of the Will was not denied. He has referred to the definition of 'execution' as contained in Section 2(h) of the Indian Succession Act and contended that from the evidence of the Deed Writer P. W. 6 and several other attesting witnesses execution of the Will by the lady was proved for it is said that he remained unshaken in his cross-examination and it was his definite statement that he wrote the Will and the testatrix put her thumb-impression in his presence which is supported by other attesting witnesses. In fact, Mr. Mitter has argued that the execution of the Will by the testatrix was not challenged in cross-examination of this witness or other witnesses who deposed on behalf of the appellant. Relying on a Bench decision of this Court in : AIR1961 Cal359 , A. E. G. Carapiet v. A. Y. Derderian, Mr. Mitter has argued that if the witnesses are not cross-examined on this vital issue then the case as propounded by the appellant must be held to have been proved. In fine, it is submitted that on the evidence adduced due execution and attestation of the Will has been proved. We cannot accept this contention as correct for owing to the serious discrepancies in the evidence of these witnesses as already noticed there exist highly suspicious circumstances regarding the due execution and attestation of the Will. Mr. Mitter has then argued relying on a Supreme Court decision in : AIR 1972 SC2492 ,

Pushpavati v. Chandraja Kadamba, that there must be appropriate elements for forming suspicion regarding the due execution and attestation of the Will. While the proposition laid down in the Supreme Court decision is undisputed, each case in our opinion must be judged by its own facts. Here, in the instant case, owing to the serious contradiction in the evidence of the witnesses adduced on behalf of the appellant we must conclude that quite a number of suspicious circumstances surrounding the execution of the Will as noticed earlier, exist and therefore it must be held that the appellant failed to prove the due execution and attestation of the Will. It is, however, argued by Mr. Mitter that the discrepancies in the evidence of these witnesses are minor having regard to the broad fact that the execution of the Will was not denied by the opposing respondents. Mr. Mitter has also relied on a Supreme Court decision in : AIR 1971 SC2236 , Smt. Sushila Devi v. Pandit Krishna Kr. Missir and contended that mere bequest in a Will to some of the near relations in preference to others will not by itself prove that the Will was unnatural and improbable if the execution and attestation of such Will are otherwise proved. Mr. Mitter may be right in his contention but in the facts and circumstances of the present case the bequest to the elder daughter and her family would be judged in the light of the evidence and other circumstances revealed in this case.

11. Mr. Ghosh learned Advocate for the respondent has submitted that only a few out of the total number of attesting witnesses were examined in this case but no explanation as to their absence has been given by the appellant. Reliance is placed on a Bench decision of this Court (Privy Council) in 27 Cal WN 485 = (AIR 1922 PC 366), Ram Gopal Lal v. Mt. Aipna Kunwar, and also on a decision of the Supreme Court in : [1962]3SCR195 , Rani Purnima Devi v. Kumar Khagendra Narayan Deb and it is contended that unless all the witnesses are examined or at any rate if no explanation is given for not examining all the witnesses, the Court would be justified in concluding that there are suspicious circumstances surrounding the execution of the Will. It is also pointed out by Mr. Ghosh that the Will is not mentioned in the proposed compromise petition and although other two Deeds of Gift were registered by the testatrix the Will in question was left unregistered. It is said that in fact the Will was brought into being only after the partition suit was filed with sole purpose of defeating or depriving the other sister from her legitimate shares in the properties. These circumstances were, however,

taken into consideration by the learned District Judge who felt inclined, we think rightly, to conclude that the will in question must have been created subsequently long after the death of Rajeshwari Debya to defeat the claims of Nirupama in the properties left by the testatrix. In any case, these circumstances no doubt create grave suspicions and tend to establish high degree of probabilities justifying a reasonable conclusion that the Will must have been created by the propounder in collusion with his mother Sushama, Byomkesh and other members of her branch and the doubts thus created in the mind of the Court were not removed by the propounder in his attempt to prove the due execution and attestation of the Will. We, therefore, on a consideration of the entire evidence and materials on record come to the same conclusion as reached by the learned District Judge and hold in agreement with him that the appellant failed to establish the due execution and attestation of the Will.

12. This brings us to the other question as to the testamentary capacity of the testatrix to execute the Will. The testamentary capacity of the testatrix has been completely denied by the first respondent. From the evidence these allegations are supported by both the witnesses on behalf of the first respondent but apart from this evidence certain lunacy proceedings, it is undisputed, were started at the instance of the husband of Nirupama, and it appears that according to the medical report of the then Civil Surgeon of Malda, she was of unsound mind. The matter, however, ultimately came up here and this Court sent back the case again for reconsideration with certain directions. Finally, when the matter came up again before this Court. Harris, C. J. terminated the proceedings, inter alia, with the following observations:

'These proceedings were begun by a son-in-law, who says that he is interested in the property, as far back as January 18, 1939, which is over two and a half years ago. In my opinion, the best course to take here is to put an end to this inquisition. It has not been shown in the meantime that she has been a danger to any one else and I am satisfied that these proceedings if they go on will be a danger to her. In my opinion these proceedings should terminate. We accordingly direct that the learned Judge proceed no further in this matter. This Rule is accordingly made absolute. There will be no order as to costs.'

13. From the above observations, the learned District Judge thought that it was not held in these proceedings that Rajeswari was either insane or sane, but we think the unsoundness of mind or mental infirmities of the testatrix cannot be ruled out altogether. At any rate, there exist reasonable grounds for disputing the sanity of the testatrix and in that event the burden of proof would lie on the person propounding the Will to prove affirmatively that the testator was of sound mind at the date of execution and further that he knew and approved the contents thereof. If on the other hand, the dispute as to the sanity of the testatrix is not well-founded the burden of proving such insanity at the date of execution of the Will is shifted to the person impeaching the Will. (See 19 Cal WN 826 = (AIR 1915 Cal 225 (2)), Sushil Kumar v. Apsari and 34 Bom LR 1371 = (AIR 1932 Bom 588), Ganpat Rao v. Basant Rao). The learned District Judge though thought in view of his finding on the question of the due execution and attestation of the Will that no further consideration was necessary with regard to the mental soundness of the testatrix, decided, however, the issue No. 2 against the propounder. We entirely agree with the learned District Judge for here admittedly the testatrix was illiterate and extremely old and the Doctors who treated her during her illness before her death were also not examined and her daughter Sushama who was mostly staying with her also did not give evidence as rightly pointed out by the learned District Judge. In the facts and circumstances of this case, it was clearly incumbent upon the present appellant, to prove that at the time of execution of the Will she was in sound mental health and thus knew, understood and approved the contents of the Will. In our opinion, the appellant also failed in this case to discharge the burden and satisfy the conscience of the Court by proving that the testatrix had a sound disposing mind and she knew, understood and approved the contents at the time of the execution of the Will. It is, however, argued by Mr. Mitter that the lunacy proceedings were started by the husband of Nirupama out of grudge and ill-will against the testatrix because of the cancellation of the power of Attorney once granted by her in his favour for looking after her properties. It is said that even in the lunacy proceedings ultimately it was not established that the testatrix was of unsound mind. Apart from this evidence it is also argued that there is no evidence on the side of the caveator to prove that the testatrix suffered from any mental illness. We do not think, for the reasons already given by us, there is much of

substance in these arguments. Accordingly it must be held that the appellant has failed to prove that the testatrix had sufficient testamentary capacity to execute the Will. In our opinion, the decision given by the learned District Judge is correct.

14. The result is, the appeal fails and is hereby dismissed with costs. Hearing fee assessed at 10 Gms.

N.C. Mukherji, J.

15. I agree.

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