

Bibhas Chandra Das Vs. Samir Chandra Das and ors.

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Court : Kolkata

Decided On : Nov-04-2008

Reported in : 2009(1)CHN47

Judge : Bhaskar Bhattacharya and ;Rudrendra Nath Banerjee, JJ.

Acts : [Succession Act, 1925](#) - Sections 222, 223 and 230

Appeal No. : F.A. No. 292 of 2004

Appellant : Bibhas Chandra Das

Respondent : Samir Chandra Das and ors.

Advocate for Def. : Bidyut Kr. Banerjee and ;Debasish Roy, Advs.

Advocate for Pet/Ap. : S.P. Roychowdhury, ;Anit Kr. Rakshit and ;Mihir Das, Advs.

Disposition : Appeal allowed

Judgement :

Bhaskar Bhattacharya, J.

1. This first appeal is at the instance of a Caveator in a proceeding for grant of Probate and is directed against the judgment and decree dated 22nd September, 2000 passed by the Additional District Judge, Fourth Court, Alipore, District- 24-

Parganas, in O.S. No. 5 of 1987 thereby granting probate of the Will in favour of the respondent No. 1.

2. One Parul Bala Das, since deceased, and her son, the respondent No. 1 before us, filed an application before the learned District Judge at Alipore for grant of probate of the last Will and Testament alleged to have been executed by Jogesh Chandra Das, who died on 13th January, 1984 leaving his widow, four sons and three daughters. The widow and one of the sons were made the joint executors of the said Will.

3. The prayer for grant of probate having been opposed, the same became contentious and gave rise to O.S. No. 6 of 1986.

4. The suit was contested by the Caveator/appellant, the second son of the testator, thereby alleging that the Will in question, was not executed out of free will of the testator but was brought about by undue influence. It was alleged that during the lifetime of the testator, the Caveator was a very affectionate son and the deceased used to look upon the Caveator as a devoted son. It was contended that there was no cogent reason on the part of the deceased to develop any indifferent or adverse attitude to deprive the Caveator of the estate left by him. It was further contended that the Caveator was never declared as a disinherited son by his father and the Will was procured at the instance of the respondent No. 1.

5. At the time of hearing, the other five children of the deceased filed written statement supporting the grant of probate.

6. During the pendency of the proceedings, the applicant No. I, the widow of the testator having died, her name was deleted from the cause-title and the suit proceeded at the instance of the respondent No. 1 alone.

7. At the time of hearing, apart from the respondent No. 1, three other witnesses deposed in favour of the grant of probate while the appellant before us and one Apurba Ganguly appeared in the witness-box on behalf of the present appellant.

8. As pointed out earlier, the learned Trial Judge by the judgment and decree impugned herein has granted probate of the said Will.

9. Being dissatisfied, the Caveator has come up with the present appeal.

10. After hearing the learned Counsel for the parties and after going through the materials on record, we find that by the alleged Will, the testator has given the house situated at Harish Mukherjee Road, Calcutta to his wife with life interest without any right to sell, mortgage, etc. and after her death, to his three sons excluding the appellant subject to the right of residence to his two unmarried daughters till their marriage. In the Will, it is further stated that the testator purchased a piece of land in Purba Barisha in the benam of his wife and the second daughter who was polio-affected. The said property was given to the widow for life and thereafter, to three of the sons of the testator excluding the appellant on condition that those three sons would bear the maintenance and the marriage-expenses of the two unmarried daughters with specific authority to the wife to sell the said land even during her lifetime to meet the marriage-expenses and the maintenance of those two unmarried daughters if those three sons did not bear the marriage-expenses and the cost of maintenance of those unmarried daughters. It appears from the description given in the cause title of the memorandum of this appeal that those two daughters are still unmarried.

11. Mr. Roychowdhury, the learned Senior Advocate appearing on behalf of the appellant, at the very outset, contended before us that although in the Will itself the testator claimed to be the real owner of the land at Purba Barisha and bequeathed the same for life to his wife with the right to sell the same to meet the maintenance of the widow and the unmarried daughters and also for expending the marriage-expenses of the unmarried daughters if those are not borne out by the three sons and ultimately, to the three sons after the death of the wife and the marriage of those daughters on condition of meeting those expenditures, it appears that the said property was sold away to third parties by the testator during his lifetime, as it appeared from the evidence adduced by the respondent No. 1.

12. In view of such submission made by Mr. Roychowdhury, the respondent No. 1 has come forward with an application for taking note of the fact that out of the total amount of the land of seven cottahs and odd, about five cottahs thereof were sold by the widow and the second unmarried daughter after the execution of the Will

but before the death of the testator and further two cottahs of lands were sold by those two persons after the death of the testator during the pendency of the probate proceedings and a meagre amount of 15 sq. ft. of land is still lying unsold. The xerox copies of the three sale deeds executed by the widow and the second unmarried daughter of the testator are annexed to the application. In view of such application, we have decided to accept those three deeds as additional evidence on behalf of the executor/respondent No. 1. The defendant/appellant has decided not to adduce any evidence of rebuttal and has, on the other hand, relied upon those deeds.

13. By relying upon those deeds, Mr. Roychowdhury arduously contended before us that the fact that those properties were claimed to be the self-acquired properties of the widow and the second daughter as mentioned in those deeds itself suggests that the probate application at the instance of the widow was not maintainable as she was asserting her right adverse to that of the testator. Mr. Roychowdhury further contends that even the respondent No. 1, the other executor, had figured as a witness to those three deeds of sale. In such circumstances, Mr. Roychowdhury contends, the probate could not be granted in favour of the respondent No. 1 since the surviving executor has also supported the claim of his mother and the unmarried sister that the said property is not the property purchased by the testator in the benam of his wife and unmarried daughter. Mr. Roychowdhury points out that in all the three deeds, it has been specifically asserted that the widow and the second unmarried daughter of the testator were not the benamders of any person. He, therefore, prays for setting aside the probate on that ground alone.

14. Even on merit, Mr. Roychowdhury contends that mere proof of signature of the testator and the alleged attestation by the witnesses were not sufficient in this case for grant of probate as by selling the Purba Barisha property as their self-acquired property during the lifetime of the testator, the widow and the unmarried daughter of the testator have made it clear that such property never belonged to the testator and, therefore, no prudent man will believe the case of the executor that the testator by the alleged Will intended to make provision for his widow and the unmarried daughter by bequeathing any property in their favour by way of

security with full knowledge that the said property did not belong to him. Mr. Roychowdhury further submits that the testator died four months after the execution of the will and it has also appeared from the evidence that there was cataract in his eyes. Mr. Roychowdhury further contends that it appears from record that one day prior to the execution of the Will the testator allegedly executed a deed of disinheritance of the Caveator and the said deed was registered along with the Will in question. By referring to such fact, Mr. Roychowdhury contends that none of the attesting witnesses who were also the witnesses to the alleged deed of declaration uttered anything in evidence about the execution of the said deed. Mr. Roychowdhury further submits that in spite of the fact that the said deed was filed in the Court, for the reason best known to the executor, he never endeavoured to prove the said deed. Mr. Roychowdhury submits that the aforesaid fact raises suspicion in the mind of any reasonable person regarding due attestation and execution of the Will. He, therefore, prays for setting aside the judgment and decree passed by the learned Trial Judge.

15. Mr. Banerjee, the learned Senior Advocate appearing on behalf of the respondent No. 1/executor has, on the other hand, opposed the aforesaid contentions put forward by Mr. Roychowdhury. According to Mr. Banerjee, his client, the respondent No. 1, has not asserted any right which is adverse to the interest of the testator and, therefore, for the act on the part of the widow and the unmarried daughter of the testator, the probate application should not fail. Mr. Banerjee further contends that even if it appeared that one of the items covered by the Will was not really owned by the testator, such fact, by itself, cannot be a ground for disbelieving the execution and attestation of a Will. In other words, Mr. Banerjee contends that a probate Court while granting the probate should not enquire whether the testator had title to the property mentioned in the Will and, therefore, the fact that the property at Purba Barisha was not really owned by the testator is inconsequential for the purpose of deciding the probate proceeding.

16. On merit, Mr. Banerjee contends that the attesting witnesses the Will having proved the due execution and attestation and, at the same time, Dr. Pyne, the family physician having signed as an attesting witness such fact signifies that the testator was physically competent and mentally alert to execute such Will, and

thus, there was no just ground for disbelieving the evidence of the available witnesses. Mr. Banerjee strenuously contends before us that the testator, after execution of the Will but before his death, had through an Advocate and Solicitor, asked the Caveator to vacate one room of the property and in that notice, the appellant was specifically informed that he had been disinherited from the property by way of registered deed but the appellant, instead of disputing assertion of the learned Advocate, threatened him that if the testator wanted to take any action he would do so at his own risk. By referring to the aforesaid stance taken by the appellant even during the lifetime of the testator, Mr. Banerjee contends that from the aforesaid fact it is apparent that there was no good relation between the testator and the Caveator and, therefore, the testator had just ground of depriving the appellant of his estate. Mr. Banerjee further contends that the Caveator's wife and mother-in-law forcibly occupied one room in the property and for that reason, the notice was issued by the testator even during his lifetime.

17. On consideration of all the aforesaid facts, Mr. Banerjee, therefore, prays for upholding the judgment and decree passed by the learned Trial Judge.

18. Therefore, the only question that arises for determination in this appeal is whether the learned Trial Judge in the facts of the present case was justified in granting probate of the Will in question in favour of the respondent No. 1.

19. Before entering into the respective submissions made by the learned Counsel for the parties on merit we are of the view that this appeal should succeed simply on the ground that both the executors having espoused an interest over the subject-matter of the Will which is adverse to the interest of the testator, no probate should be granted in their favour as by their conduct they had renounced the executorship.

20. It is now settled law that an executor cannot raise or support a claim which is adverse to the interest of the testator. The executor is bound to comply with the direction of the testator contained in the Will and cannot do anything which is inconsistent with the intention or the interest of the testator. In the case before us, the testator allegedly appointed two executors, his wife and one of the sons, the present respondent No. 1 before us. Both of them applied for grant of probate. It

has now come in evidence before us that the applicant No. 1, i.e., the widow of the testator along with her second daughter, after the execution of the alleged Will but before the death of the testator sold a portion of the property situated in Purba Barisha by asserting title which is hostile to that claimed by the testator. The testator, in the Will, specifically stated that the said property situated in Purba Barisha belonged to him and he purchased the same in benam of his widow and one of his unmarried daughters. From the three deeds exhibited before this Court on behalf of the surviving executor, the respondent No. 1, we find that of the aforesaid lands situated in Purba Barisha, almost the entire properties have been sold by the widow and the said daughter by specifically declaring that such property belonged to them and that they were the not Benamdar of anybody. The other executor, the respondent No. 1 before us, was the attesting witness to those deeds and he also admitted in evidence that such fact was within his knowledge, although, the exact date of such transaction, he could not remember. In spite of the knowledge, that his mother, the other executor, and one of his sisters, claimed part of the property covered by the Will to be their own property, he did not take any step to prevent such hostile act and rather, figured as attesting witness to those deeds to facilitate those transactions. One of the deeds has been executed during the pendency of the application for grant of probate. The aforesaid conduct clearly demonstrates that he failed to discharge his duty as executor by supporting his mother, the other executrix and the sister in selling the property to third parties during the pendency of the probate proceeding even though according to the terms of Will, the said property ultimately, will devolve upon the three sons of the testator after the death of the wife and the marriage of the unmarried daughters provided those three sons bear the maintenance and the marriage-expenses of the daughters of the testator. We have already pointed out that those two daughters have not been married yet. The widow of the testator died and her name has been struck out from the cause-title of the application for grant of probate and the respondent No. 1, notwithstanding his aforesaid stance which was in disregard to the intention of the testator, preceded with the application for grant of probate.

21. As provided in Section 222 of the Indian Succession Act, a Probate Court is not entitled to dispute the selection of the executor by the testator named in the

Will and is bound to grant probate on proof of due execution, attestation of the Will of the testator, if established to be the last Will, unless the named executor is found to be incompetent as provided in Section 223 of the Act or has renounced the executorship. Section 230 of the Act enacts the form and effect of renunciation of executorship and according to that provision, the renunciation may be made orally in the presence of the Judge or by writing signed by the person renouncing, and when made, shall preclude him forever thereafter applying for probate of the Will appointing him as the executor.

22. Even after accepting the executorship and filing an application for grant of probate, one can renounce the same but in such circumstances, the Probate Court may impose costs in favour of the Caveator to compensate the unnecessary expenses he has incurred in contesting the probate application filed by such an executor. Similarly, the renunciation of executorship can be conveyed expressly by orally declaring in the Court or can also be ascertained from any writing of the executor to that effect proved before the Court which may not be addressed to the Court. In the same way, if it appears from any document signed by the executor that he, although, has not expressly renounced the executorship, yet, has asserted title which is hostile to that of the testator or acted contrary to the direction contained in the Will or has supported such claim or act or has even orally asserted before the Court any right adverse to that of the testator or has supported such claim, such conduct of the executor amounts to implied renunciation of the executorship. If any such document signed by the executor is proved before the probate Court to be knowingly signed by the executor, the probate Court will assume renunciation of the executorship and will refuse to grant probate to such an executor. In the case before us, the respondent No. 1 by his deposition in the Trial Court admitted the fact that a part of the subject-matter of the Will had been sold and by filing affidavit before this appellate Court has proved the actual deeds executed by his mother and the second sister by which the right of the testator was disputed wherein he was a witness to the deeds.

23. In this connection, we may profitably refer to the following observations of the Supreme Court in the case of Krishna Kumar Birla v. Rajendra Singh Lodha reported in : (2008)4SCC300 of the judgement while discussing about the

caveatable interest of a party in a probate proceedings:

It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, the same must be accepted and the rules laid down therein must be followed. The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by will on ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively be adjudicated therein.

(Emphasis supplied by us)

24. Therefore, as a person disputing the title of the testator in the property cannot claim to have a caveatable interest, in the similar way, the moment an executor named in the Will disputes such right or supports somebody disputing such right, he should go out of the probate proceedings. An executor named in the Will cannot blow hot and cold in the same breath by disputing the title of the testator in the subject-matter of the Will or supporting such a claim and at the same time, proceeding with the application for grant of probate. In other words, any act on the part of the executor disputing the title of the testator in the subject-matter of the Will or supporting such a claim of a third party amounts to 'renunciation of the executorship' within the meaning of Section 230 of the Act and if such act on the part of the executor is established before a probate Court in the manner laid down in the abovementioned section, the Probate Court will not permit him either to apply for grant of probate or to proceed with the application if already filed.

25. At this stage, we are quite alive to the position of law that mere fact that a person figured as a witness to a deed does not necessarily imply that such a person had knowledge of the contents of deed; but in this case, we are satisfied that with full knowledge of the contents of the deeds filed before us, he figured as a witness therein and the fact that the property at Purba Barisha was earlier sold by his mother and the sister was within his knowledge as would appear from his own deposition in the Trial Court.

26. We, therefore, find that in view of the fact that the respondent No. 1 also acted contrary to the interest of the testator and having supported the sale by his mother and sister even before the death of his father and also after the death of his father during the pendency of the probate proceeding, no probate should be granted in his favour. By his supporting role as a witness in the deeds executed by his mother and the sister, he has acted detrimental to the interest of the testator and has frustrated the interest of the legatees under the Will.

27. We, thus, find that in view of the conduct of the executors, it is a fit case where no probate should be granted in favour of the respondent No. 1. Since the probate application itself was not maintainable at the instance of the persons, one of whom disputed the right of the testator in the property and the other supported such claim with full knowledge thereof, we set aside the probate granted by the learned Trial Judge on that ground alone without going into the other questions.

28. We make it clear that we have not gone into the question whether the Will was validly executed or attested or whether it was the last Will of the testator executed with full mental capacity. It is needless to mention that in these proceedings we had no occasion to consider whether the widow and the second daughter of the testator were really benamdars of the testator in respect of the property situated in Purba Barisha. The appeal, thus, is allowed on the aforesaid ground with costs which we assess at 1000 Gms. to be paid by the respondent No. 1 to the appellant.

R.N. Banerjee, J.

29. I agree.