

Debjani Niyogi Vs. Bani Niyogi and anr.

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Court : Kolkata

Decided On : Feb-26-2004

Reported in : 2005(3)CHN223

Judge : Asok Kumar Ganguly and ;S.P. Talukdar, JJ.

Acts : Evidence Act - Sections 63 and 67; ;[Indian Succession Act, 1925](#) - Sections 59, 63 and 65

Appeal No. : F.A. No. 198 of 2000

Appellant : Debjani Niyogi

Respondent : Bani Niyogi and anr.

Advocate for Def. : Amitabha Chowdhury, ;Gora Chand Dey and ;Arun Kanti Chatterjee, Adv.

Advocate for Pet/Ap. : Shayaprasanna Roychowdhury and ;Chittaranjan Chakraborty, Adv.

Disposition : Appeal allowed

Judgement :

Asok Kumar Ganguly, J.

1. This appeal arises out of a probate proceeding and is directed against a judgment and decree dated 16.09.1999 passed in Original Suit No. 5 of 1998 by which the application for probate to the Will in question was granted after a contest. The appellant before us, who contested the said probate proceedings, is the wife of the testator. The testator executed a Will on 14.02.1987, while living in his residential premises at 259, Darga Road, Calcutta - 17 and died on 01.06.1987 in the said residential premises.

2. Under the said Will, the testator appointed his two sisters, being the propounders to the said Will, as executrices. The grant of probate of Will was challenged by the appellant/wife and another sister of the testator, viz. Smt. Kalyani Moitra, who on her death, was substituted by Sri Anil Kumar Moitra and Soumyadarshan Moitra. But apart from filing the affidavit, the heirs of the deceased sister of the testator did not contest the grant of probate.

3. The testator married the appellant, who was a divorcee, on 31.08.1985. The appellant had a daughter by her previous husband. Within two years of the marriage with the appellant, the testator died. In the Will itself, the testator stated that the relationship between the appellant and the testator was not good and the testator recorded that the appellant was completely negligent of her household duties and was only concerned with her comfort and never looked after the needs of the testator. The testator also recorded in the said Will that the marriage with the appellant was fixed on the basis of an advertisement in the matrimonial column of a newspaper and it was also recorded by the testator that the testator was thinking of divorce with the appellant to get relief from her. But, the testator, in the said Will, made some provisions for the appellant to the extent of Rs. 750/- per month towards her maintenance so long the appellant does not remarry. But, the said amount was given on condition that the appellant must move out of the joint ancestral premises, i.e. 259, Darga Road, Calcutta-17 with her daughter and on that condition, the appellant will get the maintenance.

4. The appellant challenged the said Will on the ground that her husband, being the testator herein, used to take drugs and was not in a stable condition to make the said Will. It was also stated that the testator was susceptible to undue

influence. The appellant stated that she had good relationship with the testator and the allegation of relationship becoming bitter between the testator and the appellant is not true. It has also been stated that the said Will has not been prepared by the testator and the same is a manufactured document and the said Will has not been properly attested and executed.

5. It was also the case of the appellant that the testator was the Managing Director of Aluminium Die Casting (Pvt.) Ltd. and the two executrices were the Directors of the said Company. As the testator could not participate in the business activities of the said Company, the said two executrices, who looked after the business of the said Company, obtained the signature of the testator on blank paper on the plea that the same is required for the business activities and the Will was manufactured on the same. It was also stated that the Locker No. 1192 in the State Bank of India, Bhowanipur Branch, contained certain items of jewellery, which exclusively belonged to the appellant and no person has any right over the same. But, the same was fraudulently inserted in the list of properties attached to the said Will.

6. On the basis of such case made out by the appellant, the learned Judge hearing the testamentary suit framed the following issues :

(1) Is the Will of Dibyanjan Niyogi genuine?

(2) Is the said Will vitiated by fraud and undue influence?

(3) Had Dibyanjan Niyogi any testamentary capacity at the time of execution of the Will?

(4) Are the executrices entitled to grant of probate of the Will as prayed for?

7. Several witnesses were examined. P.W. 1, Sri Premanjan Neogi, was the elder brother of the testator and the propounders. P.W. 1 stated that his relationship with the testator was cordial and he further stated that he saw the testator executing the said Will on 14.02.1987 in his presence and in presence of the family physician, viz. Dr. Ranjit Kumar Roy (P.W. 2). P.W. 1 and 2 were the attesting witness to the said Will. P.W. 1 stated that he signed as a witness on the request made by the testator after the testator had put his signature on the Will. P.W. 1

had also stated that the testator typed the said Will himself and the testamentary capacity of the testator was perfect and he was mentally alert and physically fit at the time of execution. It was also stated by P.W. 1 that the testator read out the said Will in his presence as well as in the presence of Dr. Ranjit Kumar Roy, P.W. 2 and P.W. 1 signed the said Will after knowing the contents of the same. Then P.W. 1 deposed about the contents of the said Will. P.W. 1 also stated that the testator was a bachelor up to the age of 56 years and married rather late at the age of 57 years on the basis of an advertisement in the newspaper. The appellant, whom the testator married, was a divorcee with a daughter from her previous marriage. P.W. 1 also deposed that the testator told him that relationship between the testator and the appellant was far from satisfactory and he also deposed that the testator was treated cruelly by the appellant and that the testator wanted to divorce the appellant. P.W. 1 had also deposed that the testator was subjected to intense pressure from the appellant so that the testator may agree to adopt the daughter of the appellant from her first husband P.W. 1 also stated that he wanted to appease the testator for the sake of family prestige. The suggestion that the said Will was manufactured has been denied by P.W.1. P.W.1 also denied that the testator was a drug addict or that the signature of the testator was obtained on blank papers on the plea of using them for business purpose. P.W. 1, therefore, clearly stated that the execution of the said Will was done in his presence.

8. In the cross-examination, a suggestion was made to P.W. 1 to the effect that he was not present in India on the date of execution of the said Will, i.e. on 14.02.1987. But, the said suggestion has been refuted by P.W. 1. The passport of P.W. 1 was made an Exhibit in the proceedings and the passport was shown before us also and this Court has looked into the said passport and from the said passport, it is clear that P.W. 1 was in India on 14.02.1987.

9. In the cross-examination also, the evidence of P.W. 1 could not be shaken and it has been stated by P.W. 1 that every year, he used to come to Calcutta and stay in the first floor of the said joint ancestral residence, where the testator

10. In the cross-examination, P.W. 1 further stated that the testator knew typing. He did not see the testator typing the said Will. But, the said Will was executed in

his presence. He stoutly denied the suggestion that the signature of the testator was obtained on the blank paper or the said Will was subsequently manufactured. He also denied that the testator was drug addict. He also denied that Sri Ranjit Roy (P.W.2) did not sign in his presence. P.W.2 was a medical practitioner, who was the family physician of the testator. He also spoke of the execution of the said Will on 14.02.1987 and of his signature to the said Will and the signature of P.W. 1. P.W.2 further stated that first the testator signed the said Will and then, P.W. 1 and 2 signed successively. He identified his signature on the said Will and also the signature of P.W.1. P.W.2 also stated that the testator was physically fit and mentally alert at the time of execution of the said Will. P.W.2 stated that he did not know whether the testator was addicted to drugs. P.W.2 also denied that neither the testator nor P.W. 1 nor did he sign on any blank paper or that any paper signed by the testator previously was converted into a Will.

11. In the cross-examination, P.W.2 stated that he was the family physician in the house of the testator for the last 30 years and he did not know that the testator was a drug addict. He also stated that he did not know whether in the month of March, 1986, the testator lost his sense in a car and there he was extracted out of the said car, and in the process he sustained any injury in his leg. The Doctor also denied that a drug addict person also remains in a subconscious state and he categorically denied that the testator was not in a position to execute the said Will because he was in a sub-conscious state. P.W.2 denied that he was close with the testator, but, he stated that he was acquainted with the Niyogi family as a doctor.

12. P.W. 3 was Bani Niyogi. She was one of the executrices of the said Will. She deposed that all the properties of the testator were included in the affidavit-of-assets. She also denied any suggestion that the said Will is a manufactured one or the same was made to deprive the appellant. She also denied that there was good relationship between the appellant and the testator and also denied that the testator was a drug addict or the testator lost his mental balance. She also denied that the said Will was prepared on blank sheets of paper on which the signature of the testator was previously obtained.

13. In cross-examination, she admitted that Ext. 'Y', a letter dated 19.02.81 was written in the handwriting of Premanjan, P.W. 1. In cross-examination, she admitted that she retired in 1982 as a Joint Director of Information and Public Relation, Government of West Bengal. She did not admit that Rs. 750/-was insufficient amount for the maintenance of a housewife in the year 1987. She admitted that P.W. 2 was known to her for the last 30 years. She admitted that in March, 1987, testator purchased some N.S.Cs. in the name of his sister, Chitralekha and also in the name of his wife. In the month of April, 1987, the testator got a policy of insurance of mediclaim in the name of the appellant and in the name of Debarati, the daughter of the appellant from her first husband. She denied any knowledge of the testator being unconscious in a vehicle and/or that legs of the testator becoming stiff. She also denied any knowledge about the fact that testator broke his leg in 1986 and he had to be dragged out of the vehicle. She deposed that the testator, even though not a law graduate, had knowledge of law. She also deposed that apart from the testator, three sisters viz. Bani, Chitralekha and Depali, are the owners of the house at Darga Road.

14. P.W.4 was Rabindra Bhui, who was attached to the Aluminium Die Casting (Pvt.) Ltd. as one of the Directors and deposed that the testator was an expert in die casting and used to look after the technical, administrative and financial side of the Company. He deposed that the testator attended the office and the factory regularly and also stated that till the last week of April, 1987, the testator was actively associated with the affairs of the said Company. P.W. 4 also denied that the testator was a drug addict or was addicted to drinking. In cross-examination, P.W.4 admitted that both Bani Niyogi and Chitralekha are the Directors of the said Company. In cross-examination, P.W.4 repeatedly denied that testator was a drug addict. P.W. 5 is the other sister of the testator and one of the executrices of the said Will. P.W. 5 filed the death certificate of the testator, which was marked as Ext.3. P.W. 5 deposed to the fact that testator had a motor accident in 1986. She did not know how did the accident happen. About the accident, she further deposed that when the testator was brought home he was complaining of pain in the legs and was in the hospital for about 3 to 4 weeks. She further deposed that testator became temporarily disabled for a fracture and used crutch for the time being. She also denied that the testator was addicted either to drug or drinks. But,

she stated that the testator was a diabetic patient and he never lost his mental balance and power. She deposed that the testator lived in the joint family residence. She also deposed that four months after the marriage, there was a quarrel between the appellant and the testator and the testator also used to narrate to them the bitterness between the testator and the appellant. The testator died at the Woodland Nursing Home. She also deposed that the testator fell ill in the month of May, 1987 and when P.W. 5 wanted to call the appellant, the testator used to stop her from doing so as the testator was not on speaking terms with the appellant. In cross-examination her evidence could not be shaken. She denied all suggestions that the said Will was manufactured. She denied that there was good relationship between the testator and the appellant. She admitted that the testator made insurance policy in mediclaim in favour of the appellant and her daughter, Debarati.

15. The appellant herself adduced evidence. About the marriage, she repeated the case made out by P. Ws. except that she had good relations with the testator. She deposed that she filed a maintenance case against her former husband and the Magistrate Court ordered a maintenance of Rs. 400/-. She further deposed that she went for a pleasure trip with the testator by car to Hazaribag in September, 1986. She stated that the testator used to take drugs and get drowsy and sometimes the testator used to become inconsistent and his body used to become stiff. She also described the accident, which happened to the testator and the injury which he sustained. She identified certain letters, which were written/addressed to the testator as 'Khokan'. By referring to a letter, Ext. 'B', she said that the letters show that her husband was a drug addict. She submitted that Rs. 750/- is not sufficient for maintenance and there is no accommodation for her in her parents' house and there is no income of her parents. She denied that P.W.2 was a family physician. She was divorced from her first husband in 1982. She deposed that her husband used to take Campose tablets and used to take Insulin to control his diabetes. In cross-examination, she denied that she had any share in her father's house. But, she gets a share of rent from that house. In cross-examination, she denied that she had any locker in her own name in any bank. She also denied that she had any locker in joint name with the testator. She said that she had some ornaments in the locker in the joint name with testator and P.W.

1 with the S.B.I., Bhowanipur Branch. In cross-examination, she stated that she did not know whether for obtaining income-tax relief, the testator purchased N.S. Cs. or took the mediclaim policy.

16. D.W.2 was Kali Sinha, claimed to be a friend of the testator since 1962. D.W. 2 stated that testator was an extremely drug addicted person before his death and also stated that he had good terms with his wife. In cross-examination, he could not give the full name of his friend, nor could tell his address. He denied that he was present at the time of death of testator nor was he present at the time of marriage of the testator with the appellant. In the middle of his cross-examination, he suddenly remembered the name of the testator. This is broadly the summary of evidence adduced in the case.

17. Original Will was seen by this Court. The said Will is neatly typed on two sheets of paper. The signature of the said Will shows that the author signed it with a steady hand and looking at the Will, nobody can form an opinion that the same was manufactured or typed on blank sheets of paper, nor the signature was previously obtained. All such suggestions by the appellant were firmly refuted by the P.Ws.

18. The execution of the said Will has been proved from the evidence of P.Ws. 1 and 2. Hardly any fault can be found with the execution of the said Will.

19. The learned Counsel for the respondent, however, submitted that there are suspicious circumstances which will create doubt in the mind of the Court regarding the genuineness of the said Will and its execution. Those circumstances are :

a) Not making of any provision for the appellant except granting an amount of maintenance of Rs. 750/- per month that too a conditional one. The learned Counsel submitted that the testator's bad relationship with the appellant which was repeatedly deposed to by P.Ws. and which is also in the recitals of the Will is not consistent with the testator purchasing N.S.Cs. in the name of the appellant and also the testator's taking out a mediclaim insurance policy, not only in the name of the appellant but also in the name of her daughter by the first husband.

b) There is no scribe in respect of the Will. The testator himself typed out the Will. The Will was not drafted by any lawyer. The language of the said Will shows that unless a person is quite conversant with the legal terminology in testamentary matters, he can not draft the Will.

c) From the terminology used in the Will and the absence of any lawyer drafting the Will or in absence of any draft of the Will by any person, the Court should consider that the Will was prepared in suspicious circumstances, which throw a doubt on the genuineness of the Will.

d) The evidence of P.W. 2 was sought to be questioned on the ground that even though he claimed to be the family physician, he did not know the name of the elder brother of the testator, nor was he aware of the accident of the testator.

e) The fact that the testator after marriage went in 1986 for a pleasure trip with the appellant to Hazaribag and also a fact that the testator had purchased N.S.C. certificates in the name of the appellant and in the name of her daughter two months prior to his death, show that the relationship between the testator and the appellant was cordial and the said Will was manufactured by the propounders for their own benefit and for depriving the appellant of her shares of the residential house of the testator.

f) From some letters, which were marked Exts. (Ext.y), it is clear that the testator was unpredictable in his behaviour and this would show that he used to take drugs and he did not have any testamentary capacity to make a Will.

20. The learned Counsel for the appellant urged that from the judgment under appeal it appears that the learned Judge was obsessed with the status of the parties who were testator's relations and that is why he failed to properly appreciate the inconsistencies in their evidence.

21. The learned Counsel also relied on certain decisions in support of his contentions.

22. The learned Counsel first relied on the judgment in H. Venkatchala Iyenger v. B.N. Thimmajamma, reported in : AIR 1959 SC443 . This is a leading judgment of

the Supreme Court on the proof of Will and on the interpretation of relevant statutory provisions. In paragraph 18 and page 451 of the report, the Apex Court held that Sections 67, 63 of the Evidence Act, Sections 59 and 63 of Indian Succession Act are relevant for the purpose of considering whether a Will has been proved. After analysing those provisions, the learned Judge held that the following questions are to be asked by the Court while considering the proof of Will:

'Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 65 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.'

23. Justice P. B. Gajendragadkar, as His Lordship then was, further reiterated those principles in paragraph 19 and held that the proof of a Will introduced an element of solemnity since the testator, who has left this world, cannot say anything whether it is his Will or not?

24. After saying so, again the Court reverted to principles in paragraph 18 and held that once the aforesaid questions are answered by cogent evidence, the Courts would be justified in making a finding in favour of the propounder. In other words, 'the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.'

25. Now coming to those questions in the context of evidence in this case, it can be found that the testator's signature cannot be disputed. In fact no such challenge was thrown. An attempt was made by the appellant in the Court below to amend the written statement by incorporating averments to challenge the signature of the Will and to appoint a handwriting expert to examine the signature of the testator on

the Will. Such prayers of the appellant were rejected by the learned Trial Judge by a detailed reasoned order vide Order No. 53 dated 25.4.90. The matter was possibly challenged in the High Court and the only direction of the High Court was to dispose of the Probate proceeding early, see Order No. 55 dated 5.10.96. All these orders appear from the supplementary paper book filed in this appeal by the learned Counsel of the respondent. There is nothing to show that the signature of the appellant was forged. That was not argued before this Court either - what was argued was that signature of the testator was obtained on blank papers in connection with business and it was utilised for the purpose of making the Will. This seems to be the case as it appears from the trend of cross-examination of P.Ws. In the evidence of the appellant she did not even say this. What she said was that the testator could not go to office every day and she would simply sign papers and that 'It does not appear that my husband executed any Will'.

26. So the case of manufacturing the Will which was sought to be agitated on behalf of the appellant is not based on any evidence.

27. Next question is, did the testator understand the nature and effect of the dispositions in the Will ?

28. There is no doubt that the testator is a literate person. The case of the testator taking drugs has not been established. The evidence of the appellant on this point is not corroborated by any reliable evidence. The appellant also said that the testator used to take Campose. That is a well-known sleeping pill and not a drug in the sense that it will create a destabilising effect on the person taking it. D.W. 2 is a chance witness and his evidence taken on the whole does not inspire any confidence and was rightly rejected by the first Court.

29. Repeatedly it has been argued by the learned Counsel for the appellant that it is impossible for an ordinary person with no legal knowledge to draft the Will in the language it has been done. This itself is a mysterious circumstance which has not been explained by the propounders.

30. It is not possible to accept this contention. The testator belongs to a family where most of his relations are highly educated and were occupying high posts.

Therefore, it is an educated family. It is not unusual for a member of such a family to acquire legal acumen. It is also in evidence that the testator is educated, qualified and had knowledge of law. As a Director of the Company he used to look after the administrative side of the Company which was the family business.

31. It is not unusual for a person with this background to draft the Will himself and that by itself cannot be a mysterious circumstances. In her evidence, the appellant also did not depose to that effect.

32. Now the next point argued on behalf of the appellant is that a person having bitter relation with wife Will not purchase N.S.C. certificates in her name nor will he take mediclaim policy to cover the wife and her daughter from the first husband. This, it was argued, is not consistent with bad relationship between the appellant and the testator.

33. About the relationship between the appellant and the testator, there, is overwhelming evidence that it was far from being happy or satisfactory. In spite of such relationship which is also recorded in the Will, the testator made some conditional provisions for the maintenance of the wife, the appellant. This is quite common in Hindu families and the testator might have thought that despite such relationship some further provisions may be made and N.S.C. was purchased and the wife was made a nominee and mediclaim was taken to cover the wife and her daughter. These facts do not cast any shadow on the genuineness of the Will. It is very difficult to predict the way human emotion will unfold itself. In the instant case, it may be a late realisation of the testator to give some further benefit to the appellant and her daughter and he did it. This is certainly not a mystery shrouding the Will.

34. The other decision relied on by the learned Counsel for the appellant was in the case of *Jaswant Kaur v. Srimati Amrit Kaur*, reported in : [1977]1SCR925 . In that case several suspicious circumstances were present. By the Will of Sardar Govind Singh vast properties were disposed. But the Will made in 1945 saw the light of the day in 1957 that is 12 years after it was made and 2 and a half year after the death of the testator. No evidence was adduced to show who drafted the Will or who typed it. There are irreconcilable inconsistencies between the evidence

of two attesting witnesses. One of the attesting witnesses, Pali Ram, did not even know the testator.

35. In view of such mysterious circumstances, the Apex Court, after relying on the ratio in *R. Venkatachala* observed that the propounders did not give any cogent explanation of such circumstances and as such the Will cannot be said to be proved. In a totally different factual background of the present case, the ratio in *Jaswant Kaur (supra)* is not attracted.

36. Same is true of the Division Bench Judgement of the Karnataka High Court rendered in the case of *Virupakshappa Malleshappa and Ors. v. Akkamahadevi and Ors.*, reported in : AIR2002 Kant83 .

37. In that case the High Court held, if I may say so, rightly that no hard and fast rule can be laid down for appreciating the evidence in a case relating to proof of Will. But the propounder has to prove the due executing of the Will and explain away suspicious circumstances if any (Para 8)

38. In that case also, the Will saw the light of the day only after the filing of the suit. The witness did not say that attesting witness had signed the Will in the presence of the testator. The scribe who was an important witness was not examined. One of the attesting witnesses was not examined. These, along with various other factors, created a doubt on the genuineness of the Will in *Virupakshappa (supra)*.

39. But here facts and evidence, as discussed above, are totally different. There does not exist any suspicious circumstances.

40. As in the course of argument some observations were made by this Court about the terms of the Will, this Court was reminded by the learned Counsel for the respondent that it is beyond the province of a Probate Court to alter the terms of the Will. Several decisions were cited on that point but since this Court refrained from going into that aspect of the matter, this Court need not consider the same in detail.

41. For the reasons aforesaid, this appeal fails. The judgment and decree of the Trial Court is affirmed. There will be no order as to costs.

S.P. Talukdar, J.

42. I agree.

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