

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

PRESENT:

The Hon'ble Justice Rajasekhar Mantha

And

The Hon'ble Justice Supratim Bhattacharya

F.A.T. No. 267 of 2010

With

**I.A. No. CAN 1 of 2011 (Old CAN 2297 of 2011) And I.A. No. CAN 4 of
2022**

Radha Raman Singha & Anr.

Versus

Manju Rani Singha & Ors.

For the Appellants : Ms. Sutapa Sanyal

Mr. Subhajit Dan

Mr. Gour Baran Sau

For the Respondent : Mr. Sobhendu Sekhar Roy

Nos. 2 and 3 Mr. Argha Banerjee

Mr. Amarendra Chakraborty.

Last Heard On : 11.10.2023

Judgement Delivered On : 21.12.2023

Supratim Bhattacharya, J.:-

1. The instant appeal arises out of the Judgement and Decree passed by the Ld. Additional District Judge, 2nd Court Malda in OC Suit No.

3/2006 (Probate case), dated the 11th day of June 2010, wherein the said Ld. Judge has been pleased to dismiss the suit on contest against Ranjurani Singha and Chabi Singha without cost and dismiss ex-parte against Manjurani Singha and Smt. Chandana Singha without cost.

The Ld. Judge has been pleased to come to the conclusion that the petitioners have not been able to prove that the testatrix had independent advice and was physically fit mentally alert at the time of execution of the 'Will'. The Ld. Judge has come to the finding that the petitioners have not been able to discharge the burden entrusted on them.

- 2.** The appellants herein namely Radha Raman Singha and Smt. Prakriti Singha, who are the son and daughter-in-law respectively of the testatrix were the petitioners in the suit while the respondents herein namely Manju Rani Singha, Ranju Rani Singha, Chabi Singha and Chandana Singha who were the daughters of the testatrix were the opposite parties in the suit.
- 3.** Ranju Rani Singha and Chabi Singha being the sisters of the applicant No.1 and sister-in-law of the applicant No.2 raised objection and opposed the prayer for grant of probate in respect of the said 'Will', are the respondents in the instant appeal.
- 4.** Through the said application praying for probate it has been stated that the 'Will' in question was executed by the testatrix namely Annapurna Devi, who was the mother of the contesting parties, in presence of the witnesses after it being prepared as per her instruction.

5. The fact of the instant lis is that the appellants / petitioners namely Radha Raman Singha and Prakriti Singha prayed for grant of probate in respect of a 'Will' said to have been executed on 25.06.1997 by Annapurna Singha after it being prepared as per her direction and in her presence. After the same being prepared the said 'Will' in question has been said to be executed by Annapurna Singha the executrix in presence of the attesting witnesses.

Among the sisters, two of them that is the opposite party No. 2 namely Ranju Rani Singha and the opposite No. 3 namely Chabi Singha contested the suit by filing written statement, while the opposite party No. 1 namely Manju Rani Singha has admitted the averments made in the petition.

On being contentious the Misc. Case has been termed as Other Suit.

The said suit has been dismissed by the Ld. Trial Judge by coming to the conclusion that the 'Will' in question has not been proved by the petitioner to have been executed on independent advice and the testatrix was neither physically fit nor mentally alert at the time of execution of the 'Will'.

6. The Ld. Counsel appearing on behalf of the appellants/petitioners during his extensive submission has stated as follows:

i) The 'Will' in question has been prepared as per the direction and under the instruction of the testatrix namely Annapurna Singha

and it was scribed by one Narendra Nath Singha who was a deed writer.

ii) The Ld. Counsel has further submitted that after the said 'Will' being prepared it was executed by the testatrix without being influenced by anyone and in presence of the attesting witnesses.

iii) The Ld. Counsel has also submitted that the execution of the 'Will' by the testatrix took place after the same being read over to her by the deed writer and after being satisfied with the content of the 'Will' the testatrix had signed in the said 'Will'.

iv) The Ld. Counsel has further submitted that all the three attesting witnesses namely Manik Chandra Singha, Pradip Paul and Banu Hembram deposed and they have been cross-examined by the Ld. Counsel appearing on behalf of the opposite parties/respondents.

v) The Ld. Counsel has further submitted that the Ld. Trial Judge has misdirected himself by coming to the conclusion that the petitioners have not been able to prove that independent advice was available to the testatrix at the time of execution of the said 'Will'.

vi) The Ld. Counsel has further submitted that the Ld. Trial Judge proceeded to contemplate facts which are neither part of the pleading nor part of any deposition.

vii) The Ld. Counsel has further submitted that one of the prosecution witnesses PW3 has specifically stated that the husband of Annapurna Devi had come to call him on 22.6.1997 at about 10.10

a.m. and when he was called one of his neighbours namely Banu Hembram was present.

viii) The Ld. Counsel has further submitted that Banu Hembram (PW4) has deposed, that before her death Annapurna Devi executed the 'Will' in favour of her son and daughter-in law. This witness has further deposed that 2/3 days before the writing of the 'Will' the husband of Annapurna Devi came to the house of the witness and had requested to become an attesting witness to the said 'Will' to be executed by Annapurna Devi.

ix) The Ld. Counsel has also submitted that from the death certificate of the husband of the testatrix it transpires that the husband of the testatrix was aged 80 years at the time of his death that is on 22.08.1999.

x) The Ld. Counsel has further submitted that the Ld. Trial Judge did not take into consideration the age mentioned in the death certificate of the husband of the testatrix instead proceeded with his personal opinion.

xi) The Ld. Counsel has further submitted that all the attesting witnesses have deposed and have proved that the 'Will' in question was properly executed, after being prepared, according to Section 63 of the Indian Succession Act.

xii) The Ld. Counsel has further submitted that Section 68 of the Indian Evidence Act has also been complied.

xiii) The Ld. Counsel has further submitted that delay in filing the application for grant of probate has been taken into consideration as a factor of suspicious circumstance. Which cannot be as delay in filing an application for grant of probate cannot be said to create any suspicious circumstance. In this issue the Ld. Counsel has relied upon a Judgement published in (2012) 2 CHN 250, wherein it has been specifically held that Limitation Act does not come into play in case of application for grant of probate.

xiv) The Ld. Counsel has further submitted that the contending opposite parties has not produced any document to substantiate that their mother was under medical treatment which would go to prove that the testatrix was mentally unfit to execute a 'Will'.

xv) The Ld. Counsel has further submitted that because of the death of the deed writer his son has deposed.

xvi) The Ld. Counsel has relied upon the following judgements:

- a)** (2007) 11 SCC 621
- b)** (2005) 8 SCC 67
- c)** 2022 SCCOnline Calcutta 1645
- d)** (1995) 4 SCC 459

xvii) The Ld. Counsel has further submitted that by an application under Order XLI Rule 27 of the Code of Civil Procedure the appellants have produced a deed of gift in favour of Ranju Rani Singha.

xviii) The Ld. Counsel banking upon the aforestated points has prayed for setting aside the judgement of the Ld. Trial Court and has prayed for allowing the prayer for grant of probate in respect the 'Will' in question.

7. The Ld. Counsel appearing on behalf of the respondents while arguing has submitted the following:

i) That the testatrix left behind one son four daughters and her husband.

ii) The Ld. Counsel has further submitted that the grant of probate has been rejected on the ground of suspicious circumstances holding inter alia that the petitioners have not been able to prove that independent advice was available to the testatrix at the time of execution of the 'Will' and in addition that the testatrix was neither physically fit nor mentally alert at the time of execution of the 'Will'.

The Ld. Counsel has further submitted that one of the attesting witness has deposed that the age of the testatrix was between 65 and 70 years but the death certificate reveals that the age of the testatrix was 95 years.

iii) The Ld. Counsel has further submitted that the testatrix did not have any independent advice as is evident from the 'Will' in question although the husband of the testatrix was alive but he has not signed in the 'Will'.

iv) The Ld. Counsel has also submitted that the respondents No.2 and 3 contested the case by filing a written statement wherein it has been raised that the 'Will' is a forged and fabricated one.

v) He has further submitted that the husband of the respondent No. 2 namely expired in the year 1980 and since then the said Ranju Rani had been residing along with her parents and the said Ranju Rani used to look after her parents that is the testatrix and her husband.

vi) The Ld. Counsel has further submitted that the appellant No.1/petitioner was a Government employee working in the police department since the year 1978 and his wife that is the appellant No.2/petitioner used to reside with him throughout his service period. He has further submitted that as both the appellants/petitioners used to reside at their place of work so both the appellants/petitioners never ever looked after the testatrix or her husband.

vii) The Ld. Counsel has further submitted that the alleged 'Will' bears the plot No. 102 which has been gifted by the testatrix in the year 1991.

viii) The Ld. Counsel has further mentioned that the alleged 'Will' is said to have been executed on 25.6.1997 and the testatrix expired on 11.11.1997 while it is very much mysterious as to why the application for grant of probate was filed on 07.07.2004, that is after

about 7 years from the date of death of the testatrix, when the alleged 'Will' is said to have been all along with the executor.

ix) The Ld. Counsel has further submitted that the testatrix did not have mental capacity to execute the 'Will'.

x) The Ld. Counsel has also submitted that there is no clear evidence as to who went to Malda Town to call the scribe.

xi) The Ld. Counsel has further submitted that the attesting witnesses have deposed that the documents relating to the land were perused at the time of execution of the 'Will' and the schedule of the land was also attached to the 'Will' but no such schedule of land is found to be attached with the 'Will'.

xii) The Ld. Counsel has further stressed upon the point that there is no endorsement in the 'Will' revealing the fact that the said 'Will' was read over and explained to the testatrix after it being prepared.

xiii) The Ld. Counsel has further submitted that neither the husband of the testatrix nor any of the four daughters have been given the benefit through the said 'Will' in question.

xiv) The Ld. Counsel has further submitted that the son of the testatrix that is the appellant No.1/ petitioner played an active role in the execution of the 'Will', who is the beneficiary.

xv) The Ld. Counsel has relied upon the following judgements:

- a)** Civil Appeal No. 1969 of 2009
- b)** (2022) 1 ICC 883 (SC)
- c)** AIR 1959 SC 443
- d)** (2006) 13 SCC 449
- e)** (2006) 13 SCC 433
- f)** (2009) 3 SCC 687
- g)** (2022) 1 ICC 371 (CAL)
- h)** (2008) 7 SCC 695
- i)** 2015 17 SCC 713

xvi) Banking upon the aforesaid facts the Ld. Counsel has submitted that the Ld. Trial Judge has rightly come to the finding that the 'Will' in question has not been proved.

xvii) The Ld. Counsel has prayed for rejecting the prayer of the appellants and thus affirming the judgement of the Ld. Trial Court.

8. From the facts and circumstances it is evident that the moot point in the instant lis is as to whether the 'Will' in question is a genuine one and whether it has been executed by the testatrix in full mental capacity and without being influenced by anybody.

9. This Court now deals with the evidence of the witnesses which will guide us to reach to the destination.

10. The appellant No.1/petitioner has deposed that his mother that is the testatrix handed over the 'Will' to him. During his examination-in-chief the said witness has deposed that her mother executed the 'Will' on 25.6.1997

when she was physically fit and mentally alert. He has further deposed that the deed writer Narendra Nath Singha wrote the 'Will' as per his mother's instruction in presence of the witnesses namely Manikchandra Singha, Pradip Pal, Banu Hembram. He has further deposed that the 'Will' was executed by his mother by putting her LTI in presence of the witnesses. He has further deposed that the attesting witnesses also put their signature on the 'Will' and before execution the deed was read over and explained to his mother by the deed writer in presence of the witnesses and the attesting witnesses signed the 'Will' in presence of his mother and his mother handed over the 'Will' to him. The sequence of the deposition signifies that the appellant No.1/petitioner was present at the time of preparation and execution of the 'Will'. During the cross-examination this witness has deposed that his mother had called the deed writer but he cannot say through whom his mother called the deed writer. This evidence goes to prove the fact that the appellant No.1/petitioner being a beneficiary of the said 'Will' in question had actively participated in the preparation of the 'Will'. The appellant No.1/petitioner and the appellant No.2 are husband and wife who are the beneficiaries of the said 'Will'. The presence of the beneficiary and his active participation at the time of preparation of the 'Will' and execution of it raises doubt in the mind of this Court.

11. The executor-cum-beneficiary during his cross-examination has deposed that there is no specific schedule in the 'Will' and he has never been posted at Ratua P.S. He has further deposed that Ranju Rani used to live with his mother after the death of Ranju's husband. He has further

deposed that he has always been posted outside Malda. This witness has further deposed that his wife used to stay with him. From the evidence of the petitioner it transpires that both the beneficiaries did not use to reside with the testatrix or her husband as such question of taking care of the testatrix or her husband by the beneficiaries does not arise at all. This raises question in the mind of this Court as to the fact as to why the testatrix would like to give her entire property to those who have never taken care of her or her husband.

12. Manik Chandra Singha, one of the attesting witnesses has deposed as PW2. He has deposed that Annapurna Devi on the date of execution of the 'Will' called him and he was present at the time of preparation of the 'Will' and execution of the same. He has further deposed that in that meeting Pradip Pal, Banu Hembram, Narendra Nath the scribe and he himself were present. During his cross-examination this witness could not recollect his date of birth. This witness has further deposed that the list of properties of Annapurna Devi were written on the 'Will' and he had signed in that 'Will' in which the list of properties was appended. This witness has further deposed that Annapurna Devi did not have any disagreement whatsoever with her children.

13. The executor-cum-beneficiary has deposed that his mother had strong dispute with his sisters whereas one of the attesting witness that is PW2 who is also a relative of the testatrix has deposed that the testatrix had no disagreement whatsoever with her children. Thus it is evident that the executor has tried to malign his sisters, which goes to show that the

intention of the executor cum beneficiary is not at all correct. This raises doubt in the mind of this Court as regards to the fairness of the executor cum beneficiary namely Radha Raman Singha.

14. PW2, one of the attesting witness has deposed that the 'Will' was written having gone through the papers of the land and the list of properties of Annapurna Devi was written in the 'Will' and he had signed that 'Will' to which the list of properties was appended but on actual perusal of the 'Will' it transpires that there is no list of properties. This raises doubt in the mind of this Court as to whether the instant 'Will' which has been placed for granting of probate was at all executed by Annapurna Devi the testatrix.

15. Banu Hembram, another attesting witness has deposed as PW4 and has stated that the 'Will' was effected in his presence and in the presence of Manik Singha, Pradip Pal, Fatik Pal, Narendra Nath Singha and the daughter of Annapurna Devi, who were all present at the time of writing of the 'Will'. PW4 has deposed that the daughter of Annapurna Devi was present at the time of writing of the 'Will' which has not been stated by any of the other witness this also raises doubt in the mind of this Court.

16. PW4 that is Banu Hembram has deposed that he did not write the words 'Gramer Nam' (name of his village) below his signature and he had only written 'Kachua'. He has further deposed that he had only signed his name on the 'Will' and he did not put any date. He has further deposed that he cannot write the name of his father. From the 'Will' in question it is evident that the name of the father of Banu Hembram namely 'Musai Hembram' has

been written in different ink. A date has also been mentioned beneath the signature of Banu Hembram. These discrepancies also raise doubt in the mind of this Court and gives rise to suspicious circumstance.

17. In spite of the husband of the testatrix being alive, he has neither been given any property through the 'Will' in question nor he has been made one of the attesting witnesses in the said 'Will' which raises immense doubt in the mind of the Court as because the attesting witnesses have deposed that they had been requested to be present and to be attesting witness to the said 'Will' by the husband of the testatrix. This raises doubt in the mind of this Court as to whether at all the 'Will' which has been placed for probate was prepared and executed during the lifetime of the husband of the testatrix. When the attesting witnesses have deposed that the husband of the testatrix had requested them to be present and to be attesting witnesses to the 'Will' so it is evident that the husband of the testatrix had taken active participation but it is very much astonishing to note that the said person has not been made an attesting witness in spite of being the nearest person of the testatrix, being the husband.

Thus, there are several facts which creates doubt in the mind of this Court as regards to suspicious circumstance which could not be eradicated by the appellants/petitioners. In this aspect this Court relies upon the Paragraphs 11.1 and 11.3 of the Judgement passed by the Hon'ble Apex Court published in (2021) 11 SCC 277 which states as follows:

"11.1. The will being a rather solemn document that comes into operation after the death of the testator, special provisions are made in the statutes for making of a will and for its proof in a

court of law. Section 59 of the Succession Act provides that every person of sound mind, not being a minor, may dispose of his property by will. A will or any portion of a will, the making of which has been caused by fraud or coercion or by any such importunity that has taken away the free agency of the testator, is declared to be void under Section 61 of the Succession Act; and further, Section 62 of the Succession Act enables the maker of a will to make or alter the same at any time when he is competent to dispose of his property by will. Chapter III of Part IV of the Succession Act contains the provisions for execution of unprivileged wills (as distinguished from privileged wills provided for in Chapter IV).

11.3. Elaborate provisions have been made in Chapter VI of the Succession Act, in Sections 74 to 111, for construction of wills which, in their sum and substance, make the intention of legislature clear that any irrelevant misdescription or error is not to operate against the will; and approach has to be to give effect to a will once it is found to have been executed in the sound state of mind by the testator while exercising his own free will. However, when the will is surrounded by suspicious circumstances, the Court would expect that the legitimate suspicion should be removed before the document in question is accepted as the last will of the testator.”

18. The contesting respondents /opposite parties have raised the point that the ‘Will’ in question is dated 25.06.1997 and the testatrix expired on 11.11.1997 while the application for probate has been made in the year 2004. The respondents have stressed upon the point of delay in filing the application for probate. As regards to delay in filing an application for probate this Court states that the law of limitation is not enforceable in case of petition filed praying for probate. In this regard refers to Paragraphs No. 7 and 8 published in 1957 SCC OnLine Cal 160 which states as follows:

“7. ... proceeded to say that it was not necessary to pursue the matter further, for in the opinion of their Lordships even if Article 181 does apply to the application in question, it may still be said to be within time. These observations of their Lordships of the Supreme Court are binding upon this Court even though they may be in the nature of obiter dicta. Mr. Sen Gupta contended before us that the actual decision was made not on this basis but on the ground that even if Article 181 applied to the application which was before their Lordships it would still be within time. He contended that

the observations to which I have just now referred were not even obiter dicta inasmuch as no final decision was arrived at by their Lordships on this point. I am unable to accept that contention of Mr. Sen Gupta. It seems to me that their Lordships did take the view that the long catena of decisions may well be said to have added the words "Under the Code", to the first column of that Article and if as a result of judicial constructions these words have come to be read into the first column then their Lordships cannot hold that subsequent amendment of Articles 158 and 178 must have the effect of altering the meaning of Article 181 on the ground that the reason on which the old construction was founded was no longer available. It seems to me that their Lordships did take a definite view on this point although the actual decision was made on other grounds. That being so, I am of opinion that the view expressed by their Lordships of the Supreme Court on this point is binding on us and we should give effect to the same. The contention, therefore, of Mr. Sen Gupta on this point must fail. There is further difficulty in accepting the view pressed before us by Mr. Sen Gupta. The question, as I have mentioned, still remains as to when the right to apply accrues. Article 181 even if it applies lays down a period of three years starting from the period when the right to apply accrues. The question is when in a case of this kind the right to apply for probate accrues. Mr. Sen Gupta contended that it must accrue from the date when the executor for the first time became aware of the Will. I am unable to accept that contention. In my opinion, the right to apply for probate accrues from day to day so long as the Will remains unprobated. I agree with the submissions of Mr. Gupta on this point and hold that the reason why it has not been made necessary in an application for probate under section 276 of the Indian Succession Act to state the facts constituting the cause of action and when the cause of action arose is that in the case of an unprobated Will the cause of action for an application for probate arises every moment so long as the Will remains unprobated. This view of mine finds clear support from a decision of the Madras High Court which has been subsequently followed by a Division Bench of this Court. In the case of Gnanamuthu Upadesi v. Vanakoilpillai Nadan, (8) I.L.R. 17 Mad. 379 Mr. Justice Muttusami Ayyar held that the limitation Act does not apply to applications for probate, and the applications referred to in Article 178 of Schedule II of that Act which corresponds to Article 181 are applications under the Code of Civil Procedure. In the course of his judgment Mr. Justice Muttusami Ayyar made these significant observations:

"The reason for the exemption of application for probate from the operation of the Limitation Act probably is that

the application for probate is in the nature of an application for permission to perform a duty created by a Will or for recognition as a testamentary trustee, and the right to apply continues so long as the object of the trust exists or any part of the trust if really created, remains to be executed.”

8. These observations to my mind lay down the basic principle on which this question has to be decided and they accord with the view which I have taken as to the time when the right to apply for probate accrues. In a subsequent decision of a Division Bench of this Court, Durgapada Bera v. Atul Chandra Bera, (9) 41 C.W.N. 1204, Henderson and Biswas, JJ. also took the view that applications for probate or letters of administration are not governed by the law of limitation. In their judgment their Lordships referred with approval to the said observations of Mr. Justice Muttusami Ayyar and repeated that the reason why the applications for probate are exempted from the operation of the Limitation Act probably is that such an application is in the nature of an application for permission to perform a duty created by the Will or for recognition as a testamentary trustee, and the right to apply continues so long as the object of the trust exists or any part of the trust if really created, remains to be executed.”

19. These ample facts raises doubt in the mind of this Court and gives rise to legitimate suspicious circumstances, which leads this Court to reach to the conclusion that the ‘Will’ in question is not genuine.

20. Considering the aforesaid discussion this Court is of the view that the Judgement passed by the Ld. Trial Judge does not require any interference. Thus, the judgement passed by the Ld. Trial Court stands affirmed.

21. F.A.T. No. 267 of 2010 stands accordingly **dismissed**.

As the instant appeal has been dismissed so **I.A. No. CAN 1 of 2011 (Old CAN 2297 of 2011)** being an application praying for injunction by the appellants stands **dismissed**.

I.A. No. CAN 4 of 2022 being an application under Order XLI Rule 27 of the Code of Civil Procedure praying for production of additional evidence and to take into consideration a deed of gift in favour of Ranju Rani Singha by Annapurna Devi and electoral roles of the constituency namely Ratua stands **allowed** to arrive at the just conclusion and the aforementioned two documents are taken into consideration.

22. Parties shall be entitled to act on the basis of the server copy of the Judgement and Order placed on the official website of the Court.

23. Urgent certified photo copies of this judgement, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree,

(Supratim Bhattacharya, J.)

(Rajasekhar Mantha, J.)

Later:-

After the Judgement is dictated, Learned Counsel for the petitioners prays for stay of operation of the Judgement.

In view of the aforesaid submissions, the Judgement shall remain stayed for a period of one month from this date.

(Supratim Bhattacharya, J.)

(Rajasekhar Mantha, J.)