



GAHC010299072019

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Test.Cas./6/2019

SMTI. MANDIRA PAUL AND ANR
W/O- LATE MOTILAL SHUKALA DAS, R/O- HAILAKANDI TOWN, WARD
NO. VI, P.S. AND DIST.- HAILAKANDI, ASSAM.

2: SRITI SHIB MANDIR
REP. BY PETITIONER NO. 1
R/O- HAILAKANDI TOWN
WARD NO. VI
P.S. AND DIST.- HAILAKANDI
ASSAM

VERSUS

SMTI. MAYA RANI DEV AND ANR
W/O- SRIDAN DEV, R/O- HAILAKANDI TOWN, WARD NO. VIII, P.S. AND
DIST.- HAILAKANDI, ASSAM.

2:SMTI. MANGALA SHUKLA DAS
D/O- LATE MOTILAL SHUKALA DAS
R/O- HAILAKANDI TOWN
WARD NO. VI
P.S. AND DIST.- HAILAKANDI
ASSAM

Advocate for the Petitioner : MS. S B CHOUDHURY

Advocate for the Respondent :

BEFORE
HON'BLE MR. JUSTICE SUMAN SHYAM



For the appellants : Mrs. S. B. Choudhury, Advocate.
Mr. N. Ray, Advocate.

For the respondents : None.

Date of hearing : 03.11.2022

Date of Judgment : **17.11.2022**

JUDGMENT AND ORDER (CAV)

1. Heard Mrs. S. B. Choudhury, learned counsel appearing for the appellants. None has appeared for the respondents .

2. This appeal is directed against the judgment and order dated 18.07.2019 passed by the learned District Judge, Hailakandi in connection with Title Suit (Probate) No.02/2018 rejecting the prayer made by the appellants/petitioners for grant of probate in respect of the Will dated 02.04.2010 allegedly executed by the testatrix viz., Late Mandadhari Sukla Das.

3. The facts and circumstances of the case, in a nutshell, are that the petitioner No.1, Smti. Mandira Paul had instituted Title Suit (Probate) No.02/2018 seeking probate in respect of Will dated 02.04.2010 executed by her deceased mother Mandadhari Sukla Das wherein she was appointed as the executor. In the aforesaid probate case, the Deity of "Sri Shiv Mandir" was impleaded as the petitioner No.2. The other two daughters of Late Mandadhari Sukla Das viz. Smti. Maya Rani Dev and Smti. Mangala



Sukla Das were impleaded as OP Nos.1 and 2. According to the petitioners, by executing the Will dated 02.04.2010, the testatrix had bequeathed 3/4th of the profit generated from her property to be enjoyed by the petitioner No.1 and her two sisters viz. OP Nos.1 and 2 and the remaining 1/4th of such income was to devolve in the name of the petitioner No.2 (Deity). The petitioner No.1 has also claimed that she had been appointed as the executor of the Will, which was executed in presence of attesting witnesses.

4. The opposite parties appeared in the proceeding before the learned District Judge, Hailakandi and contested the probate suit by filing written objection *inter-alia* denying the execution of the Will. They have also alleged fraud on the part of the petitioner No.1 by stating that the will had been created by the petitioner No. 1 in collusion with the two attesting witnesses.

5. Based on the pleadings of the parties, the learned court below had framed four issues which are as follows :-

“(i) *Is there any cause of action for the suit?*

(ii) *Whether the Will in question was executed by the deceased Mandadhari Sukla Das and whether at the time of execution of the Will, she was in fit state of mind and health to execute the Will and whether the Will is a genuine one or not?*

(iii) *Whether the petitioners are entitled to get probate of the Will in question?*

(iv) *To what other relief/reliefs, the petitioners are entitled?"*

6. During trial, the petitioners had examined four witnesses including the petitioner No.1 as PW-1 and had also exhibited the death certificate of the testatrix as well as the original Will as Exts-1 and 2 respectively. On the other hand, the OPs had examined two witnesses in support of their claim. After considering the materials available on record, the learned District Judge had dismissed the probate title suit by inter-alia holding that there was no mention about the date of death of the testatrix in the petition and the seal affixed in the Will (Ext-2) also appeared to be tampered. The learned court below has also observed that it was nowhere mentioned that the Will in question was the last will of the deceased testatrix and the attesting witnesses also did not depose that the Will was executed in their presence. The trial court has further observed that the death certificate of the deceased, produced before the court by the petitioners, also appeared to be a tampered document and hence, a strong suspicion arises as to the due execution of the Will. By observing that the petitioners have failed to remove the suspicion in accordance with law, the suit was dismissed. Hence, this appeal.

7. Referring to the materials available on record, Mrs. Choudhury, learned counsel for the appellants, submits that since the petitioners had produced the death certificate of the testatrix showing the date of her death as 25.01.2014, which is nearly four years after the execution of the Will and considering the fact that the scribe of the Will viz., PW-3 has admitted his mistakes in the Will, the learned trial court ought to have accepted such explanation and treated the Will to be a genuine one. It is also



the submission of Mrs. Choudhury that the learned court below has erred in law in passing the impugned judgment by failing to consider that the execution of the Will had been duly established by the petitioners in accordance with law and therefore, there was no valid ground for the learned court below to dismiss the suit.

8. I have considered the submissions made by the learned counsel for the appellants and have also gone through the materials available on record.

9. Law is well settled that the onus to prove due execution of a Will is always upon the propounder. In the case of **Mahesh Kumar (Dead) by LRs. Vs. Vinod Kumar and others** reported in **(2012) 4 SCC 387** the Hon'ble Supreme Court has held that the propounder would have to discharge the onus by proving that the testator had read out and signed the Will in presence of attesting witnesses who appended their signatures on it in presence of the testator.

10. In a recent decision of the Supreme Court rendered in the case of **State of Haryana versus Harnam Singh (Dead)) Through Legal Representatives And Others** reported in **(2022) 2 SCC 238**, it has been held that in order to determine the genuineness of the will as per requirement of section 63 of the Indian Succession Act, 1925, the evidence brought on record must be credible and inspire confidence. It has further been held that requirement of section 63 of the Indian Succession Act, 1925 cannot be said to have been fulfilled by mechanical compliance of the stipulations therein. Evidence of meeting the requirement of the said provision must be reliable.

11. The rule regarding execution of unprivileged Wills, laid down in Section 63 of Chapter III of the Indian Succession Act, 1925, is reproduced herein below for ready



reference :-

“63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

12. From a plain reading of Section 63(c) of the Act of 1925, it is evident that the Will would be required to be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will in presence and under the direction of the testator.

13. Under Section 68 of the Indian Evidence Act, 1872 the execution of the Will must be proved by examining the attesting witnesses.

14. From a reading of the petition filed before the learned court below, I find that although the date of execution of the Will has been mentioned as 02.04.2010, yet date of death of the testatrix is nowhere mentioned in the petition.



15. The petitioner No.1 has examined herself as PW-1. In her cross-examination the witness has stated that her mother had expired on 25.01.2014 but the learned trial court has doubted the genuineness of the Death Certificate produced by the petitioners by observing that the lamination appeared to have been tinkered with.

16. This court also finds that it is nowhere mentioned in the Will that the same was the last will of the testatrix nor has it been mentioned that the same had been executed voluntarily and not under any duress or pressure. The witness PW-1 has also admitted that there is no mention in the Will that the same has been executed in presence of witnesses.

17. One of the attesting witnesses viz. Sri Santush Nath was examined as PW-2. In his deposition PW-2 has stated that he had attested the Will but he could not say as to when and where the Will was executed. PW-2 has also stated that he cannot say the date on which the Will was made nor does he have any knowledge about the content of the Will. This witness has, however, stated that prior to making the Will the testatrix had told him that she is going to donate the landed property in favour of the temple and asked him to put his signature in the Will.

18. The other attesting witness viz., Sri Uttam Debnath was examined as PW-4. In his evidence-in-chief this attesting witness had deposed in a manner identical to that of PW-2. However, during his cross-examination, PW-4 has admitted that the Will was prepared in the court campus and on being asked by the writer, he had put his signature. At that time, the petitioner No.1 and her mother (testatrix) were also present. PW-4 has further stated that the testatrix had told him that she is going to



donate the property in favour of the temple. But he has clarified that he could not say as to when the testatrix had put her signature in the Will nor could he say as to whether the signature in the Will is that of the testatrix Mandadhari or not. PW-4 has further stated that he could not say as to who are the persons who had put their signatures in the Will. It is therefore, evident that the Will in question had not been executed in the presence of this attesting witness.

19. Md. Samsul Haque Barbhuiya claims to be the scribe of the Will and he was examined as PW-3. In his deposition, PW-3 has stated that he had written the Will in question but there were printing mistakes in respect of the address of the parties. PW-3 has also admitted that there were two seal impressions at the same place over the Will and in the back side of the stamp affixed to the Will, there is no seal or signature of the Treasury authority.

20. The OP No.2, Smti. Mangala Sukla Das had examined herself as the DW-1. While denying the execution of the Will and raising a question mark on the genuineness of the Will, this witness has stated that after the demise of the testatrix an amicable partition of the property left behind by her was made with the help of the elderly persons who are residents of the locality and during that process, the petitioner No.1 had never mentioned about the existence of any Will but instead, had accepted the partition. DW-1 has also stated that the alleged Will dated 02.04.2010 has been fraudulently executed by the petitioner No.1 pursuant to a conspiracy hatched with the two attesting witnesses so as to grab the entire property left behind by her deceased mother. This witness has further stated that after the death of her



mother, when she had opened the wooden almirah, then she found that her mother's bank and post office account books, land deed, death certificate and other valuables were missing. At that time they had lodged a complaint based on which CR Case No.835/2015 was registered under Sections 468/420/379/34 IPC and the matter was taken up for investigation. DW-1 has further stated that her mother had never executed any Will and the properties left behind by her had been inherited by the three sisters viz., the petitioner No.1 and the OP Nos.1 and 2.

21. Md. Sahab Uddin Iasgar was examined as DW-2. This witness has deposed that he knew both the parties and he was present when the disputed land was mutually partitioned amongst the three sisters with the help of the neighbouring people to which all the three sisters had agreed and accordingly, got possession of their respective shares. He has further deposed that as far as his knowledge goes, no Will was executed by the testatrix. When he had examined the "Willnama" he found that the signature of Late Mandadhari Sukla Das was written in a different style which appeared to be forged. He could say so since he was familiar with the signature of Mandadhari Sukla Das.

22. Upon a careful analysis of the materials available on record, I find that while the attesting witness PW-4 has clearly admitted that the Will was not executed in his presence, the other attesting witness PW-2 did not furnish any particulars as regards the date, time and place of execution of the Will. There is no reliable evidence on record to clearly establish the date, time and place of execution of the will. In view of the specific objection raised by the Opposite parties/ respondents as regards the



genuineness of the Will it was incumbent upon the appellants to establish those facts , which they have , evidently failed to do. It is, therefore, apparent that the requirement of Section 63(c) of the Indian Succession Act, 1925 has not even remotely been met in this case.

23. From an examination of the Will dated 02.04.2010 (Ext-2), I find that two different seals of the Notary Public were put on the photograph of the testatrix and it is evident from a bare perusal of the document that one of the seals was subsequently affixed on the Will. However, there is no proper explanation coming from the petitioners on that behalf. On an ocular assessment of the original Will dated 02.04.2010, which is available in the LCR, I also find the signature of the testatrix put in the three pages of the document do not tally with one another. Under the circumstances, the evidence adduced by the opposite parties in the form of DW-2 raising a doubt on the genuineness of the signature of the testatrix on the Will cannot be ignored by this Court. The learned court below has also rightly observed that there is no mention in the document dated 02.04.2010 that the same was the last will and testament of the testatrix. There is also no certificate or any other material to indicate the mental condition of the testatrix on the date of execution of the alleged Will.

24. It is also to be noted herein that PWs-2 and 4 have deposed that the testatrix had told them that she intends to donate the entire property in favour of the Deity. The said position is, however, inconsistent with the reflection made in Ext-2 as well as the case projected in the petition. As such, there is material contradiction in the case



projected by the petitioners/appellants.

25. For the reasons discussed herein above, this Court is of the opinion that there are enough suspicious circumstances surrounding the execution of the 'Will' and the propounder has failed to displace such suspicion by bringing cogent materials on record. In other words, the propounder has failed to discharge the onus of proof as regards the genuineness of the Will (Ext-2). Such being the position, I do not find any justifiable ground to interfere with the impugned judgment and order dated 18.07.2019 passed by the learned court below.

26. For the reasons stated here-in-above this appeal is held to be devoid of any merit and the same is accordingly dismissed.

There would be no order as to cost.

Send back the LCR.

JUDGE

T U Choudhury/Sr.PS

Comparing Assistant