IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Nishita Mhatre
And
The Hon'ble Justice Asha Arora

F.A. No. 20 of 2014

Pulak Mukherjee
-Appellant
-Versus –
Santosh Mukherjee & Ors.
- Respondents

For the Appellant:	Mr. Shib Prosad Ghose.
For the Respondent Nos. 1 and 2	Mr. Chandra Bhanu Sinha Mrs. Kajal Chattopadhyay
For the Respondent Nos. Nos.3, 4, 5 and 7	Mr. Nanigopal Sarkar Mr. Avijit Sarkar

Heard on : 20.04.2015, 21.04.2015 and 22.04.2015.

Judgment on : 22.04.2015.

Nishita Mhatre, J.:

1) The appeal is directed against the decision of the Trial Court refusing to grant to the appellant, probate of the Will executed by his father, Bibhuti Mukherjee.
2) Bibhuti Mukherjee allegedly executed a Will on 27th of September, 1995. That Will was registered. The Appellant, who is the son of Bibhuti Mukherhjee, was appointed as the sole Executor of the Will. Bibhuti Mukherjee expired on 8th October, 1997. The Appellant preferred

a petition for grant of probate on 5th July, 2007 before the District Judge, North 24-Parganas at Barasat, being Miscellaneous Case (P) No. 255 of 2007 (P).

3) A written statement was filed on behalf of Gouri Roy, Smt. Krishna Singh and Mita Kar, the Respondent Nos. 3, 5 and 7. They contended that their father was very ill prior to his death and was immobile. The Respondents further pleaded that the Appellant had managed to secure a Will in his favour in order to deprive them of their father's property. They also contended that the Appellant never bothered about their father during his life-time and that though the Respondents were the married daughters of the deceased, they looked after him.

4) Evidence was led before the Trial Court. The propounder of the Will, the Appellant herein, examined himself and one of the attesting witnesses, Pradip Chatterjee. The Respondents did not step into the witness box at all to rebut the appellant's evidence.

5) The Trial Court, after considering the pleadings and the evidence on record, dismissed the application for probate. The Trial Court was of the view that the execution of the Will was shrouded in suspicious circumstances as the testator could not have executed it on his own and out of his free will and consent. The Trial Court, however, found that the signature of the testator had not been challenged by the Respondents. No witness had been examined by them before the Court. The Trial Court then observed that the Will had been proved. However, the Trial Court concluded that because it could not be said that it was executed voluntarily and without duress, a cloud was cast upon the execution of the Will.

6) Mr. Ghosh, the learned Counsel appearing for the Appellant, submits that the Trial Court has erred in refusing the probate by ignoring the evidence on record. He submits that for the purpose of obtaining the probate of the Will, the propounder was only required to prove that the testator had executed the Will and that the attesting witnesses had signed the same in presence of the testator. According to Mr. Ghosh, all the necessary formalities required under section 63 (c) of the Indian Succession Act, had been complied with and, therefore, the Trial Court was duty bound to grant the probate.

7) The learned Counsel has relied on the judgments in the case of ***Saktipada Chatterjee*** – Vs- ***Annakali Debya***, ***AIR 1953 Calcutta 462***, ***Vidhyadhar*** – Vs- ***Mankikrao and Another***,

1999 SC 1441, ***Smt. Baby Dey*** – Vs- ***Birendra Kr. Dutta & Anr***., ***(2009) 3 Calcutta Law Times 381 (HC)*** and ***K.M. Varghese*** – Vs- ***K.M. Oommen, 1994 Kerala, 85*** in support of his submission.

8) Mr. Sinha, the learned Counsel, appearing on behalf of the Respondent Nos. 1 and 2, submits that his clients do not have any objection if the probate is granted in favour of the Appellant.

9) The learned Counsel for the Respondent Nos. 3, 4, 5 and 7 submits that all the attesting witnesses have not been examined by the propounder of the Will. According to him, although the phrase "at least one witness" has been used in Section 63 of the Indian Succession Act, all the attesting witnesses must be examined to prove the execution of the Will. The learned Counsel further submits that the testator was not capable of making a Will as he was mentally unfit and physically unstable. The learned Counsel also submits that the Trial Court had correctly formed an opinion that the making of the Will was shrouded in suspicious circumstances and, therefore, the will could not be accepted as genuine. He has relied on the judgment in the case of ***Janki Narayan Bhoir*** – Vs- ***Narayan Nemdeo Kadam***, reported in ***(2003) 2 SCC 1991***, ***Babu Singh & Ors***. – Vs- ***Ram Sahai alias Ram Singh***, ***(2008) 14 SCC 754*** and ***Bharpur Singh & Ors.*** - Vs- ***Shamsher Singh***, ***AIR 2009 SC 1766*** in support of his contentions.

10) It will be necessary for us to first consider whether the Will has been proved.

11) Section 63 of the Indian Succession Act, 1925 provides the mode of executing a Will. It must be attested by two or more witnesses, each of whom has seen the Testator sign or affix his marks on the Will. Each of these witnesses must sign this Will in the presence of the testator. Section 68 of the Indian Evidence Act stipulates the manner in which the execution of a Will is required to be proved. At least one attesting witness must be examined to prove the execution of the Will.

12) In the present case there is no doubt that one of the attesting witnesses has deposed before the Court. The witness Pradip Chatterjee has stated in his Examination in Chief on affidavit that he had affixed his signature to the Will and was present on 27th September, 1995 when the Will was registered. He has stated that he saw the testator signing the Will and that he signed the same in his presence. He has also averred that the testator was mentally and physically fit when he signed the Will. In his cross-examination the witness has deposed that at the time of execution of the Will, the deceased was about 72 to 75 years of age. He has, however, admitted that he was "asked to sign the Will later where there was signature of Bibhuti Babu". He has further stated that Dulal Roy and one Sweta Basu (Respondent No.6) were also witnesses to the execution of the Will. He has denied the suggestion that he did not see Bibhuti Babu signing the Will. He has also denied the suggestion put to him that the testator was not mentally sound or physically fit when he executed the Will.

13) The learned Advocate, appearing on behalf of the Respondent Nos. 3, 4, 5 and 7, has submitted that the very admission given by this witness that he was asked to sign the will "later" where the signature of Bibhuti Babu was affixed would show that he was not present when Bibhuti Babu signed the Will.

14) This submission of the learned Counsel for the Respondent Nos. 3, 4, 5 and 7 is without merit.

15) The suggestion put to this witness that he had not seen the testator sign the Will, has been denied categorically by him. Therefore, what he meant when he said that he signed the Will "later" was that he signed the Will after Bibhuti

Babu had affixed his signature on the Will in his presence. Obviously two persons cannot sign a document at the same time; one will necessarily sign it after the other. What is material while proving the execution of a Will is, that the attesting witness must see the testator sign or affix his mark on the Will, or must receive a personal acknowledgement of the testator about his signature or mark. There is no doubt that the attesting witness was present when the document was signed by Bibhuti Babu and immediately thereafter the attesting witness affixed his signature. Therefore the submission of Mr. Sarkar for the respondents is not tenable.

16)The Supreme Court has succinctly enunciated the law with respect to proving the execution of an unprivileged Will in ***Janki Narayan Bhoir*** (supra) in paragraphs 8, 9, 10 and 11 of the said judgment as follows :

> " *To say a will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e.(a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the*

signature of such other person, and each of the witnesses has to sign the will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory."

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining

at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. Attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined , in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under section 68 of the evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been

called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the Court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best , but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of

his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will.

17) Mr. Sarkar, the learned Counsel appearing on behalf of the Respondent Nos. 3, 4, 5 and 7, urged that all the attesting witnesses must depose before the Court to prove the execution of the Will by pressing into service certain observations of the Supreme Court in ***Babu Singh*** (supra). This interpretation of the learned Counsel cannot be accepted. The Supreme Court has observed that the requirement of attestation of a Will by two witnesses would not necessarily mean that both the witnesses must be examined in Court. It was sufficient if one of the attesting witnesses was examined. The Court further held that although it is not necessary to call more than one attesting witness to prove due execution of a Will, it would not mean that an attested document should be proved by the evidence of one attesting witness only and two or more attesting witnesses cannot be examined. The Court observed that as the words "at least" have been used in section 68 of the Indian Evidence Act, it envisages the necessity of more evidence than mere attestation. The Court held that in addition to proving the execution of the Will by examining the attesting witness, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any.

18) In the case of ***Baby Dey***, a learned Single Judge of this Court observed that no adverse presumption can be drawn if the propounder had proved the execution of the Will by examining only one of the attesting witnesses. Similarly in the case of ***Saktipada Chatterjee***, the Division Bench of this Court observed that the presumption in the case of a Will is that the attesting witnesses signed after the testator had signed the Will. The Court observed that where the evidence of the attesting witnesses is not specific but vague or doubtful, the Court may take into account the surrounding circumstances of the case and judge whether the requirements of the statute have been complied.

19) Considering the aforesaid judgments, in our opinion, a Will can be proved even if one attesting witness is examined. There is no need for more than one attesting witnesses to be examined at all. It is no doubt true that the execution of the Will must be in the presence of "at least" two attesting witnesses. However, this does not mean that both the witnesses have to be examined before the Court unless one of the witnesses has failed to prove the execution of the Will. No adverse interference can be drawn merely because all the attesting witnesses have not been examined to prove the Will.

20) Mr. Sarkar, appearing for the Respondent Nos. 3, 4, 5 and 7, then submitted that there were suspicious circumstances surrounding the execution of the Will. According to him, the testator was not mentally sound nor was he physically fit. Therefore, he could not have executed the Will or attended the registration office to have the Will registered.

21)In the present case, there is no evidence at all led by the Respondents to oppose the grant of probate. Mere pleadings in the written statement regarding the disability of the testator cannot substitute hard evidence. Without there being any deposition to prove that the testator did not have a sound and dispositive mind and, was therefore, incapable of making the Will, it is not possible to accept the submission of the learned Counsel. There is also no evidence to prove that the testator was so feeble that he could not attend the registration office to have his Will registered. The learned Counsel has relied on paragraph 17 of the judgment in the case of ***Bharpur Singh & Ors*** to fortify his submission that the execution of the Will was shrouded in suspicious circumstances. Paragraph 17 of this judgment reads as follows:

> "Suspicious circumstances like the following may be found to be surrounded in the execution of the Will :
>
> i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature;
>
> ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
>
> iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
>
> iv. The dispositions may not appear to be the result of the testator's free will and mind.
>
> v. The propounder takes a prominent part in the execution of the Will.
>
> vi. The testator used to sign blank papers.
>
> vii. The Will did not see the light of the day for long.
>
> viii. Incorrect recitals of essential facts."

22) However, the learned Counsel was unable to disclose to us which of the aforesaid circumstances were present in this case in order to record a finding that the execution of the Will was surrounded by suspicious circumstances. When there is no evidence on record nor any suggestions put to the witnesses - either to the Appellant or to the attesting witness, it is impossible to accept the contention that the testator had executed the Will under undue influence from the Appellant.

23) In order to dispel any reservation about the Will because the property had been left only to the two sons, namely the Appellant and the Respondent No. 1, we had the Will translated from Bengali to English. The testator has clearly said that he did not desire to bequeath any property to his daughters as they were happily married and were living with their children in their home. The testator has also mentioned that his son, Sankar was well off and, therefore, did not require any property from him. It is in these circumstances, that he willed the property owned by him to his wife Rekha Mukherjee, and after her death to his sons, Santosh and Pulak , the Respondent No.1 and the Appellant herein. One of the suspicious circumstances surrounding the execution of a Will could be that the executor of the Will is bequeathed the entire property. However, in the present case, the bequest has been made firstly in favour of his wife and then to his son, the Respondent No.1, who was not well off according to the testator and the propounder of the Will.

24) In these circumstances, in our opinion, the execution of the Will cannot be said to have occurred in suspicious circumstances. The finding of the Trial Court on this score is, in our opinion, incorrect.

25) Accordingly, the appeal is allowed. The judgment of the Trial Court is set aside. The Trial Court will grant probate to the Appellant immediately.

26) Photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties upon compliance of all necessary formalities.

(Asha Arora, J.) **(Nishita Mhatre, J.)**