Serial No. 23
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

FAO No. 7 of 2003

Date of Decision : 27.09.2019

Smti Karabi Das **Vs.** Shri Aparesh Das

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner(s)/Appellant(s): Mr. L.R. Das, Adv. with
Ms. M. Chakraborty, Adv.

For the Respondent(s) : None for Respondents

i) Whether approved for reporting in Law journals etc. Yes/No

ii) Whether approved for publication in press: Yes/No

1. This instant appeal under Section 299 of the Indian Succession Act read with Order 41 Rule 1 of the CPC has been preferred against the Judgment & Order dated 12.11.2003 passed in TEST Case (Probate) No. 1(H) of 2001 by the Additional District & Sessions Judge, Shillong. The background facts of the case is that the original respondent, one Smti Arati Das's husband died on 12.05.1986 leaving behind landed property that was mutated in favour of the son on 05.01.1989. The son thereafter had entered into an agreement on 14.02.2000 with the appellant to sell the vacant portion of the land. A sale deed was thereafter executed on 20.02.2001, possession taken over by the appellant, and permission was obtained to construct a residential house thereon.

2. Thereafter it seems that the deceased respondent filed a suit being T.S. No. 20(H) of 2001, for declaration on 01.11.2001, impleading the appellant and her husband as defendants 1 & 2 and her own son Shri Aparesh Das as defendant No. 3. Though injunction was obtained initially, the same was vacated and an appeal filed therefrom was dismissed on 11.05.2006.

3. The appellant herein also filed a suit being T.S. No. 22(H) of 2001for declaration of title and impleaded the deceased respondent and her son Aparesh (current respondent herein) as defendants. Injunction was granted and was made absolute after hearing. Aparesh Das (son) did not contest the suit and the same was decreed on 30.04.2007 and no appeal was preferred thereafter.

4. The deceased respondent (Arati Das) also filed a petition for grant of probate impleading her son (Aparesh) as opposite party purportedly on the basis of a will dated 15.09.1984 allegedly left by her husband claiming that the same was discovered only on 30.10.2001. The appellant got herself impleaded as opposite party No. 2 and filed her show cause. The deceased respondent's son (Aparesh) however did not contest the said probate. The probate was thereafter allowed, and against the said grant of probate this instant appeal was filed before this Court which directed that status quo be maintained. During the pendency of the appeal the original respondent (Arati Das) expired on 28.10.2006 and a petition for substitution was filed to substitute Aparesh Das in her place. Though said Aparesh Das received notice, he did not enter appearance and substitution was allowed vide order 30.03.2007.

5. In the meantime, Smti Ratna Das, wife of Aparesh Das filed a petition for review of order dated 30.03.2007 and prayed for her substitution in place of her mother-in-law claiming that vide a will dated 19.08.2005 executed by her mother-in-law, she had bequeathed the entire property to her minor daughters and appointed her as the executor. The appellant objected to the said review application and this Court vide order dated 27.06.2007 dismissed the said application for substitution. A Civil Appeal was then preferred before the Hon'ble Supreme Court against the said order dated 27.06.2007, and the proceedings of the instant appeal

were stayed vide order dated 22.10.2007, but the same after hearing was dismissed vide order dated 17.08.2017.

6. As such, after this long and twisted journey the instant appeal then proceeded to be listed for hearing. The hearing even after dismissal of the matter in the Supreme Court could not proceed as the respondent was untraceable and fresh steps had to be issued. Various orders were issued thereafter, but the respondent remained untraceable. Finally, after verifying the status of the case, this Court vide order dated 18.07.2019 posted this matter for final hearing.

7. Heard Mr. L.R Das learned counsel for the appellant who submits that the impugned judgment and order dated 12.11.2003 is bad in law and the grant of probate given in the absence of any cogent reason merely on a chance discovery of the so called will after 17 years of the date of its execution and 15 years from the death of the testator defies any reasoning. He further submits that the learned Court below in spite of holding that the circumstances surrounding the matter smacked of an ulterior motive and possible conspiracy between the mother and son, committed grave illegality in granting the probate. Learned counsel also submits that the learned Court below had also held that the deceased respondent was very much aware of the sale of the plot of land prior to 30.10.2001 but however disregarded the same and passed the probate.

8. Mr. L.R. Das, learned counsel for the appellant then submits that the learned Court below has caused substantial injustice in passing the impugned order in spite of realizing that it was a clear case of collusion between the mother and son to defraud the appellant. He points out to the aspect that the factum of collusion is clearly revealed as the same counsel was engaged by the mother (Arati Das) in the declaratory suit against the appellant wherein she had made the son a defendant, and in another case before the Court of the Special Judge the same counsel was defending the son. He submits that the entire sequence of events such as the chance discovery of the will on the day when the appellant went to take possession of the land, and the filing of the suit to defraud the appellant in spite of being aware of the sale, has irrefutably substantiated the fact that there was blatant collusion between the mother and son and as such the grant of

probate by the learned lower Court, even after noticing the said events and facts is bad in law and the impugned order was liable to be quashed and set aside.

9. Mr. L.R. Das has placed reliance on the decision reported in the case of ***Jaswant Kaur vs Amrit Kaur & Ors***. Reported in ***(1977) 1 SCC 369*** with regard to suspicious circumstances and that the burden of proving due execution of the will, lay on the party setting up the will against claim by the other party since such party would fail if no evidence is led. Reliance has also been placed in the case of ***Bharpur Singh & Ors. Vs. Shamsher Singh*** reported in ***(2009) 3 SCC 687*** on genuineness, suspicious circumstances and burden of proof.

10. I have heard the learned counsel for the appellant and examined the materials on record.

11. This matter after its long journey as observed earlier has been heard exparte, inasmuch as, the respondent even after being duly served had never entered appearance which compelled this Court to fix the matter for exparte hearing vide order dated 26.03.2019.

12. The order under challenge passed by the Probate Court had limited itself to the issues No. 3 and 4 while deciding the grant of probate. Issues No. 3 and 4 reads as follows: -

> ***"3. Whether the (L) Nripendra Bhushan Das executed his last will and Testament on the 15th Sept 1984 at Shillong ?***
>
> ***4. Whether testator of the said will had sound disposing mind at the time of execution of the same?***

13. These two issues were taken up together and the learned lower Court while deliberating on the same came to a finding which is reproduced herein as follows: -

> ***"Taking up the issued No. 3 & No. 4 "Whether the (L) Nripendra Bhushan Das executed his last will and Testament on the 15th Sept 1984 at Shillong, "Whether testator of the said will had sound disposing mind at the time of execution of the same? The petitioner has submitted that from the evidence of the parties and the will which was Exhibited as Ext. 1, it is clear that (L) Nripendra Bhushan Das has executed the will as per the provision of laws and the same is accordingly valid in this regard. It was pointed out that Section 63 of the Succession act was duly complied***

with inasmuch as under Section 63(A) The Testator has duly signed the will and his signature being Ext. B of Ext. 1 which has not been contradicted by the Opp. Party. The placement of Ext. B on the body of Ext. 1 has also indicated that Section 63b is duly complied with. Further-more the petitioner's counsel has submitted that as regard Section 63c which mandates the attestation of 2 or more witnesses to the signature of the testator, the same has been duly complied with when the P.W. 1, Noni Gopal Biswas has stated in his evidence that Ext. A in Ext. 1 is his signature and that signature of the testator and his signature were put in the said will on the same day, that is, 15.9.1984. It was also submitted that PW3 Shri. Jyotirindra Bhattacharjee who is also one of the two attesting witnesses has stated that Ext. 1/C is his signature and the signature of the testator Ext.1/B in Ext. 1 was affixed in his presence. Therefore, the petitioner has submitted that the will is duly executed by the testator in sound state of health and mind.

The Opp. Party on the other hand, has refuted this contention and has submitted that the will purportedly executed on 15.9.84 has not been executed in the presence of two witnesses.

When as seen from Ext. 1 in the left side of the said Exhibit under the heading Witnesses, it was stated "Signed by the testator and acknowledged by me to be his last will and testament in presence of us," the evidence of the PW 1 proved otherwise when in his cross-examination he has stated that the testator did not sign the will in my presence and also Jyotirindra Bhattacharjee was not present when I signed the will. This contradiction as well as the evidence of the PW 3 who has stated that the will was signed by me as the witness in the presence of the testator goes to prove that section 63C has not been duly complied with, and as such, this issue ought to be decided in the negative."

14. Though the findings as recorded were in the negative the lower Court, then proceeded to analyse Section 63 (c) of the Indian Succession Act, and held that it is not necessary that the witnesses attest the will in each other's presence and only the fact that the said will was duly attested by the two witnesses would suffice and as such found the will to be validly executed.

15. That going on further with regard to issue No. 5 which is quoted herein below,

"5. Whether ignorance of the petitioner about the will for 16 years after its execution and 14 years after the death of

the Testator and the production of the same on chance discovery by the sole legatee inspires confidence ?

the learned Lower Court on examination of the evidence came to a categorical finding that the respondent (Arati Das) had totally contradicted herself, when on one hand she had pleaded that she was not aware about the existence of the will and that the same had been suppressed from her by her own son, while on the other hand she deposed that she had handed over papers, ornaments including the will, to a tenant for safe keeping in the bank locker. The learned Lower Court thereafter decided the issue in the negative and observed that the 'chance discovery' of the said will is not at all believable, and further that is smacked of an ulterior motive and a possible conspiracy between the deceased respondent (Arati Das) and her son (Aparesh). The relevant portion of judgment of the lower Court wherein these findings are contained are reproduced herein below: -

"On issue No. 5 the petitioner's counsel has submitted that the petitioner was not aware of the existence of any will of the deceased untill the 30th Oct 2001 when a person names, Shri. Bidur Das and his associate entered the property and claimed that his wife, Smti. Karabi Das, the Opp. Party herein had purchased the portion of the property measuring about 2500 Sq. ft. more or less and as the petitioner was not aware of such transfer, she then entered into the room of her son to search for some relevant documents pertaining to the title of the property, where upon she came across the will for the first time, and it was only then that she knew its existence or/and has accordingly filed this petition for grant of probate. It was also submitted that the Opp. Party, that is, the son of the petitioner has suppressed the information about the existence of the said will (Ext 1) and as such, the petitioner is completely ignorant of the existence of a will and it was only a chance discovery of the will which has lead to the initiation of the instant proceeding and for this reason this issue may be decided in the affirmative.

The opp. Party on the other hand, has contended that the petitioner by her own admission and contradiction has failed to inspire confidence, as far as, this issue is concerned. It was submitted that the petitioner who was examined as PW 2 has stated, in her deposition that "I am living together with my son and daughter-in-law and two grandchildren," " Since 1975 my son used to stay away

from home", "a few days after the death of my husband I handed over all the documents in respect of the property to my tenant as my son was in Calcutta. The tenant kept the documents in his bank locker." I had handed over the papers and ornaments to the tenant in a bag under locked. The bag contained all documents including the will. It was also pointed out that PW 3 in his cross-examination has stated that "The will was signed by him in the presence of the testator and his wife, Smti Arati Das". Mrs Das was present in the same room in which the testator had read over the will to me".

On the basis of the above it was submitted that the petitioner was very much aware of the existence of the will and had conviently withheld it existence till such opportune time and this certainly does not expire confidence.

While considering the submission and contention of the parties with regard to this issue, I am in agreement with the opp. Party that the petitioner has totally contradicted herself when on one hand, she has pleaded that she is not aware of the existence of a will and that the will was suppressed from her by her son, but on the other hand, in her evidence she has stated that she has handed over all the papers, ornaments including the will to a tenant for safe keeping in a bank locker. As such, her story of a chance-discovery of the said will only at the point of time when the husband of the Opp. Party (Karabi Das) came to the premises for execution of a sale of a portion of the property measuring about 2500 St. ft. smacks of ulterior motive and a possible conspiracy between mother and son which according to me the story of a chance-discovery of a will is not at all believable. And as such, this issue is accordingly decided in the negative."

16. Further with regard to issue No. 6 which is quoted herein below:-

"6. Whether the petitioner has full knowledge about the transfer of about 2500 Sq. ft. of land by the petitioner's son to the opp. Party (Caveator) ?

the learned lower Court while dealing with the same elaborately discussed the sequence of events and also examined the records of the T.S. No. 20 (H) of 2001, and came to a finding that the plea that the deceased respondent was not aware about the transfer of the said portion of the property had created 'suspicious circumstances' and as such decided the issue against the respondents, by holding that the deceased

respondent was very much aware of the transfer of the said portion of land prior to 30.10.2001. The relevant extract of the above noted finding by the learned lower Court is reproduced herein below: -

> ***"The Opp. Party on the other hand, has contended that the petitioner was a willing party to the transfer of the said plot of land in favour of the caveator when in her own pleadings in paragraph 7, she has stated that Title Suit No. 20 (H) 2001 was filed before the court of Munsiff at Shillong against the Opp. Party (Caveator) and two others as Defendants, however, in the said Title Suit in paragraph 7 of the same. The petitioner has stated that "When the relationship of mother and son became strained the defendant No. 3 in other to earn some illegal gain and profit for himself without any knowledge of the Plaintiff. On 4th Dec. 2000 entered into agreement for sale of a portion of land measuring about 2500 Sq. ft. from the joint property of the Plaintiff and the Defendant No. 3 (Son) with the defendant No. 1 (opp. party/Caveator). The petitioner had also annexed a copy of the said agreement with the plaint and as such, this proves that the petitioner is very much aware of sale of the plot of land even prior to 30.10.2001 and as such she could not explained why she had not objected to the same as early as 4.12.2000. Her plea that she is not aware of the transfer of the said portion of the property has created a suspicious circumstances which will proof detrimental to the petitioner's case and as such this issue ought to be decided against the petitioner.***
>
> ***While considering this issue and the submission and contention of the parties, existence of the said T.S. No. 20(H)01 pending in the court of Munsiff, Shillong was already on record as one of the plea of the petitioner and also the contention of the Opp. party has referred to the contents of this Title Suit and as such, I find that the said Title Suit needs to be perused to clarify the issue.***
>
> ***Accordingly, the case record of the said T.S. No. 20(H)01 was called for and I have perused especially paragraph 7 of the plaint and in this regard, I found that the contention of the opp. party is well founded and it can be presumed that the petitioner is very much aware of the transfer of the said portion of land measuring about 2500 Sq. ft. but has denied such knowledge in this instant petition and as such, this issue is decided in the affirmative."***

17. The learned lower Court however, while considering the totality of the circumstances and evidence on record, held that the findings in issues No. 5 and 6 would not materially affect the validity of the will,

and in conclusion while granting the certificate, observed that the grant of probate would not be prejudicial to the case of the appellant and that the question of validity of sale, right and interest could be agitated in the proper forum.

18. On a detailed examination of the impugned judgment, it can be seen that the learned lower Court had arrived at two vital findings on the question of **'chance discovery'** and **'suspicious circumstances'** after appreciation of the evidence as tendered, in favour of the appellant, which had cast a cloud over the genuineness and veracity of the will, and the entire events subsequent thereto. Evidence adduced in such situations, should satisfy the Court's conscience before refusing or granting a probate, inasmuch as, the propounder should have removed all reasonable doubts which herein however was not the case. In this context, the judgment of **Jaswant Kaur** (supra) will have a bearing, paragraph 9 which is relevant for the discussion is quoted herein below:-

> ***"9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will."***

19. It would also be apposite to quote Paras 14, 16 and 17 of the judgment of ***Bharpur Singh*** (supra) which is also very relevant on the facts of the present case.

> ***"14. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the will***

is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.

16. In H. Venkatachala Iyengar v. B. N. Thimmajamma, AIR 1959 SC 443, It was also held that the propounder of will must prove:

(i) that the will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and

(ii) when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of propounder, and

(iii) If a will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

It was moreover held:-
"20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether

the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

17. This Court in Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao, (2006) 13 SCC 433 held: (SCC pp. 447-48, paras 33-34)

"33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85 and Sridevi v. Jayaraja Shetty, (2005) 2 SCC 784). Subject to above, proof of a will does not ordinarily differ from that of proving any other document.

34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:

(i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;

(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit. (See H. Venkatachala Iyengar v. B. N. Thimmajamma, AIR 1959 SC 443 and T.K. Ghosh's Academy v. T.C. Palit, (1974) 2 SCC 354)."

20. Though the learned lower Court had, as mentioned earlier, come to a clear finding with regard to the suspicious circumstances surrounding the will and its chance discovery, it fell into error, in granting the probate thereafter without satisfying itself on every aspect, which has

resulted in injustice being caused to the appellant. Further, as noted earlier, T.S. No. 22 (H) 2001 has since been decreed in favour of the appellant on 30.04.2007 that is, after the impugned order herein had been passed, and as such the question of validity of the sale, right and interest of the appellant over the property in question has been laid to rest.

21. In view of the forgoing facts and circumstances, the instant appeal is allowed, impugned order dated 12.11.2003 passed in Test Case (Prob) No. 1 (H) of 2001 set aside and quashed and the grant of probate vacated.

JUDGE

Meghalaya
27.09.2019
"V. Lyndem PS"