SUPREME COURT OF INDIA

Yumnam Ongbi Tampha Ibemma Devi

Vs.

Yumnam Joykumar Singh

Crl.A.No.1600 of 2009

(Dr. Arijit Pasayat, V.S. Sirpurkar and Asok Kumar Ganguly JJ)

06.03.2009

JUDGEMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a learned Single Judge of the Guwahati High Court in the First Appeal by the respondents. Before the High Court challenge was to the order passed by learned Additional District Judge (Fast Track Court) Manipur East, Imphal, in Original (Probate) Petition No. 14/92/19 of 2003.

3. Background facts as noted by the High Court are as follows:

Shri Yumnam Joykumar Singh, Smt. Yumnam Ningol Khumanthem Ongbi Bijanbala and Smt. Yumnam Ningol Binodini Dcvi, who are the respondents, are the son and daughters of late Yumnam Gouramani Singh.

Smt. Yumnam Ongbi Tampha Ibema Devi, who is the appellant in this appeal, is the widow of late Yumnam Mani Singh, son of the said late Yumnam Gouramani Singh, Smt. Yumnam Ningol Harijabam Ongbi Binodkumari Devi, who is the respondent No.2 in this appeal, is a daughter of late Gouramani respondent. Smt. Loitongbam Ningol Yumnam Ongbi Ibeyaima Devi, Yumnam Raynold Singh and Kumari Yumnam Rina alias Riya Devi, are widow, son and daughter respectively of late Yumnam Birmani Singh, son of the said late Yumnam Gouramani Singh. Smt.

Yumnam Ongbi Lalitabi Devi, is the widow of the said late Yumnam Gouramani Singh. Shri R.K. Barunisana Singh, who is the proforma respondent in the appeal, is the husband of Binodini. Appellant filed an application alleging that her father in-law Yumnam Gouramani Singh duly executed his last will on 13-8-86 in accordance with law in presence of two attesting witnesses bequeathing the plot of land under C.S. Dag No. 16/2720 measuring `053 acres of Patta No. 304 of Unit A-1, Imphal Municipality at Thangal Bazar along with building standing thereon in her favour. In this application, the appellant prayed for granting letters of administration with the Will annexed in her favour.

The appellant before the High Court and respondent Nos. 6, 7 and proforma respondent No.8 opposed the application by filing a written statement wherein they denied the alleged due execution

of the will. It was submitted that there was no execution of a will much less in accordance with law. It was also stated that on the alleged date of execution of the will i.e. 13.8.1986, the said Yumnam Gouramani Singh was staying in U.P. and not in Imphal. It was also alleged that there were suspicious circumstances which ought to be considered before the will could be accepted as genuine.

It is to be noted that in the proceedings before the learned Additional District Judge the following three issues were framed.

"(1) Whether late Yumnam Gouramani Singh left behind a Will dated 13.8.1986 bequeathing the plot of land under C.S. Dag No. 16/2720 measuring 53 acres of patta No. 304-A of Unit A- 1 Imphal Municipality to the petitioner Yumnam Tampha Ibema Devi? (2) Is the Court fee paid properly? (3) Is the petitioner Yumnam Tampha Ibema Devi entitled to the relief claimed?"

It appears that by judgment and order dated 9.4.2004 the learned Additional District Judge accepted the prayer and directed as follows:

"Heard Learned counsel for the parties. And also for the discussion, observations and reasons aforesaid, I am of the view that (L) Y. Gouramani Singh had executed the will Ext.A/1 in favour of the petitioner. In the result, it is ordered and decreed that a letter of administration be issued in favour of petitioner on her deposit of the requisite stamp as required by the Indian Succession Act, 1925, minus the plot of land given in Exts. B/1,B/2,B/3 and B/4. Case is accordingly disposed of."

The primary stand before the High Court was that no issue was framed regarding the genuineness of the Will, and the requirements of Section 63 of the Indian Succession Act, 1925 (in short the `Succession Act') and Section 68 of the Indian Evidence Act, 1872 (in short the `Evidence Act') were not kept in view. The High Court accepted the prayer particularly with reference to the evidence of PW 2 who claimed to be one of the attesting witnesses. The High Court allowed the appeal inter alia holding that the evidence of PW2 is vague and it cannot be said that there was due execution of the will in question. PW 2 was not even having knowledge about the death of the alleged executor more than 14 years prior to the date of his giving evidence. Though he claimed that he had reached the house of said Gouramani Singh on being summoned, there was nobody present when he had gone there. He stated that he had put the signature without understanding as to why he was putting his signature and he did not know the nature of the document on which he had put his signature. He also did not state that said Yumnam Gouramani Singh put his signature on the document or if the said Gouramani Singh said anything about his signature or mark having been put on the document. He did not say anything about presence of any another person as an attesting witness in respect of any document by the said Yumnam Gouramani Singh. The High Court concluded that PW2 failed to testify anything regarding alleged due execution and attestation of the will. Accordingly, the appeal was allowed.

4. Learned counsel for the appellant submitted that the High Court has lost sight of the fact that PW2 deposed in court after a long lapse of time.

Merely because he omitted to say certain things that cannot be a ground to discard the evidentiary value of his evidence and the High Court should not have interfered with the order of the trial court.

5. Learned counsel for the respondents supported the judgment.

6. As per provisions of Section 63 of the Succession Act, for the due execution of a Will (1) the

testator should sign or affix his mark to the Will;

(2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a Will; (3) the Will should be attested by two or more witnesses, and (4) each of the said witnesses must have seen the testator signing or affixing his mark to the Will and each of them should sign the Will in presence of the testator.

7. The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested witness should put his signature on the Will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary.

Since a Will is required by law to be attested, execution has to be proved in the manner laid down in section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document. Therefore, having regards to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.

8. In Girja Datt Singh v. Gangotri Datt Singh [AIR 1955 SC 346] this court observed as follows:

"15. When this position was realised the learned counsel for Gangotri fell back on an alternative argument and it was that the deceased admitted execution and completion of the will Ex. A-36 and acknowledged his signature thereto before the Sub-Registrar at Tarabganj and this acknowledgment of his signature was in the presence of the two persons who identified him before the Sub- Registrar viz. Mahadeo Pershad and Nageshur who had in their turn appended their signatures at the foot of the endorsement by the Sub-Registrar. These signatures it was contended were enough to prove the due attestation of the will Ex. A-36. This argument would have availed Gangotri if Mahadeo Pershad and Nageshur had appended their signatures at the foot of the endorsement of registration animo attestandi. But even apart from this circumstance it is significant that neither Mahadeo Pershad nor Nageshur was called as a witness to depose to the fact of such attestation if any. One could not presume from the mere signatures of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses.

Section 68 of the Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses.

This line of argument therefore cannot help Gangotri."

9. In B. Venkatamuni v. C.J. Ayodhya Ram Singh [2006(13) SCC 449], it was observed as follows:

"15. It is, however, well settled that compliance with statutory requirements itself is not sufficient as would appear from the discussions hereinafter made.

16. The approach of the Division Bench of the High Court did not address itself the right question. It took an erroneous approach to the issue as would appear from the decision of this Court in

Surendra Pal v. Dr.

Saraswati Arora [1974(2) SCC 600] whereupon again Mr V. Balachandran himself placed reliance, wherein the law was stated in the following terms: (SCC p. 605, para 7) "7. The propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain."

17. In H. Venkatachala Iyengar v. B.N.

Thimmajamma [AIR 1959 SC 443] it was opined: (SCR pp. 443-45) "However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents.

The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily 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 the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

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."

In Guro v. Atma Singh [1992(2) SCC 507] this Court has opined: (SCC p. 511, para 3) "3. With regard to proof of a will the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Succession Act, 1925. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit. The presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator."

19. Yet again Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence.

20. This Court in Daulat Ram v. Sodha [2005(1) SCC 40] stated the law thus: (SCC p. 43, para 10) "10. Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses 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. In addition, it has to satisfy the requirements of Section 63 of the Succession Act, 1925. In order to assess as to whether the will has been validly executed and is a genuine document, the propounder has to show that the will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (emphasis supplied)

21. Yet again in Meenakshiammal v.

Chandrasekaran [2005(1) SCC 280] it was stated: (SCC p. 287, para 19) "19. In Chinmoyee Saha v. Debendra Lal Saha [AIR 1985 Cal 349] it has been held that if the propounder takes a prominent part in the execution of the will, which confers a substantial benefit on him, the propounder is required to remove the doubts by clear and satisfactory evidence. Once the propounder proves that the will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the disposition and put his signature out of his own free will, and that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged and when allegation of undue influence, fraud or coercion is made by the caveator, the onus is on the caveator to prove the same."

(See also Sridevi v. Jayaraja Shetty [2005 (2) SCC 784].

22. The principle was reiterated in Pentakota Satyanarayana v. Pentakota Seetharatnam [2005 (8) SCC 67] wherein it was stated: (SCC pp. 81-82, para 24) "24. In the instant case, the propounders were called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated above."

However, having regard to the fact that the will was a registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did not (sic) know well the contents of the will and in sound disposing capacity executed the same.

23. Each case, however, must be determined in the fact situation obtaining therein.

24. The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance with legal formalities as regard proof of the will would subserve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance."

10. In Benga Behera v. Braja Kishora Nanda [2007(9) SCC 728] in paragraphs 40 and 41 to 46 it was inter alia observed as follows:

"40. It is now well settled that requirement of the proof of execution of a will is the same as in case of certain other documents, for example gift or mortgage.

The law requires that the proof of execution of a will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. (See Madhukar D. Shende v.

Tarabai Aba Shedage [2002(2) SCC 85] Janki Narayan Bhoir v. Narayan Namdeo Kadam [2003(2) SCC 91] and Bhagat Ram v. Suresh 2003(12) SCC 35.)

41. The Court granting letters of administration with a copy of the will annexed or probate must satisfy itself not only about the genuineness of the will but also satisfy itself that it is not fraught

with any suspicious circumstances.

42. No independent witness has been examined to show how the testatrix came close to Respondent 1. Why valuable agricultural land measuring ac. 4.187 and homestead land along with a house standing thereon had been gifted in favour of the first respondent, has not been explained. The original will has not been produced. Why both the will and the sale deed should have been executed on the same day, has not been explained.

43. The burden on the first respondent was heavy, he being a stranger to the family. He failed to discharge the said burden. Variance, inconsistencies and contradictions have been brought on record, particularly in the statements of PW 4 and PW 9 and other witnesses vis-`- vis the contents of the document, which we have noticed hereinbefore.

44. Learned trial Judge as also the High Court did not take into consideration the effect of such contradictions and inconsistencies, particularly the interpolation/variance in the xerox copy of the will vis-`- vis certified copy thereof. Serious consideration was required to be bestowed on the contention of the appellants that thumb impressions of the testatrix on different pages of the xerox copy did not tally. No effort was made to compare the thumb impression appearing on the xerox copy with the thumb impression appearing on other admitted documents. Non-production of the original will stating that the will got lost, gives rise to an inference that it might have been that the will did not contain the thumb impression of the testatrix. The testatrix was an old and ill lady. She had no independent adviser in the matter of the execution of the will. On the other hand, the plaintiff-Respondent 1 and his father being disciple of her guru were in a position to dominate her mental process.

45. Respondent 1 was a student at the relevant time.

His father had taken an active part in the entire process in registering and culmination of the will in favour of his son. There are materials on record to show that although sufficient time had been granted for examination of the other attesting witnesses, Chandramani Das Mohapatra was not summoned. No summon could be issued only because his correct address had not been furnished.

46. Existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the will has not been duly proved."

11. The position was reiterated in Anil Kak v. Sharada Raje [2008(7) SCC 695].

12. It is to be noted that the trial court did not even record any reason for coming to the conclusions as done. No issue was framed regarding the validity of the will. The evidence of PW2 does not in any way support the claim of due execution and attestation of the will. On the contrary, it clearly establishes that he did not sign in his presence, he did not know what was the nature of the document. There was no attesting witness who has signed in his presence and, therefore, the requirements of Section 68 of the Evidence Act have to be complied with in order to show that the two persons who claimed to have signed as attesting witness can be really treated as attesting witnesses. Above being the position, we find no merit in this appeal which is accordingly dismissed.