Indu Bala Bose & Ors vs Manindra Chandra Bose & Anr on 18 November, 1981

Equivalent citations: 1982 AIR 133, 1982 SCR (1)1188, AIR 1982 SUPREME COURT 133, 1982 (1) SCC 20, (1982) 95 MAD LW 146, (1982) LS 9, 1982 UJ (SC) 7, (1982) 1 SCR 1188 (SC), 1982 (1) SCR 1188, (1982) 1 SCJ 132, (1982) GUJ LH 100

Author: Baharul Islam

Bench: Baharul Islam, A.P. Sen

PETITIONER:
INDU BALA BOSE & ORS.

Vs.

RESPONDENT:
MANINDRA CHANDRA BOSE & ANR.

DATE OF JUDGMENT18/11/1981

BENCH:
ISLAM, BAHARUL (J)
BENCH:
ISLAM, BAHARUL (J)
SEN, A.P. (J)

CITATION:
1982 AIR 133 1982 SCR (1)1188
1982 SCC (1) 20 1981 SCALE (3)1766
CITATOR INFO :
RF 1987 SC 767 (2)
F 1990 SC 396 (21)

ACT:
Probate suit-Mode of onus of proof of a sale, explained-Hindu Succession Act, section 63.

HEADNOTE:
One Ranendra died unmarried on November 16, 1952 leaving the alleged will (Exhibit-1) executed on November, 8, 1952. Ranendra left behind him three brothers-Jitendra Chandra Bose, Gopendra and Manindra plaintiff No. 1. Manindra and Jogendra (Plaintiff No. 2) had been appointed executors of the will. By the will Ranendra bequeathed one-

half of his properties to his nephew, Bhabesh, who was the son of his younger brother, Phanindra, who had predeceased him, and the remaining half to his younger brother Manindra for life, and after Manindra's death to Bhabesh absolutely. The executors of the will as aforesaid filed an application before the Subordinate Judge. Alipore, for probate of a will executed by Ranendra. Jitendra entered caveat and filed a written statement and contested application for probate. During the pendency of the suit, Jitendra died and his heirs who were substituted, contested the suit.

The contentions were that Ranendra was not in a physical or mental condition to execute a will; he was in a semi-conscious state of mind and had not the testamentary capacity to execute the alleged will and that the alleged will was brought into existence at the instance, and under the influence of the propounder Manindra; that the signatures of Ranendra on the will were not genuine.

The trial court found that the signatures of the testator and the attesting witnesses were genuine and that the provisions of the will was neither unfair nor unnatural. But the trial court dismissed the suit and refused to grant probate of the will on the ground that there were certain "doubts and suspicions about the condition of the testator's mind on 8-11-1952". In appeal before the High Court, the decree of the trial court was set aside and the propounder was granted probate of the will.

Dismissing the appeal by certificate granted by the Calcutta High Court under Article 133(1)(b) of the Constitution, the Court,

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HELD: 1.1. The mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by section 63 of the Successions Act. [1191 D]

1:2. 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 test-a

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mentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case 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. If the propounder himself takes the prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. [1191 D-H 1192 A]

Shashi Kumar Banerjee & Ors.v. Subodh Kumar Banerjee & Ors, A.I.R. 1964 S.C. 529; H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors., [1959] Supp. 1 S.C.R. 426; Rani Purnima Devi and Another v. Kumar Khagendra Narayan Dev and Another, [1962] 3 SCR 195 followed.

1:3. A circumstance would be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person. [1192 A-B]

1:4. A careful perusal of the eleven circumstance shows that they are by no means suspicious circumstances and stand self-explained. On the contrary the following circumstances lend strong support to the plaintiffs' case of genuineness and valid execution of the will: (i) Gopendra one of the brothers, who has not been given anything under the will had filed a written statement stating that the "has no objection to the grant of probate inasmuch as the will is executed and attested according to law"; (ii) the disposition under the will is quite fair and there are no suspicious circumstances in it at all; (iii) as there were litigations between the two groups of the brothers, the will was the natural outcome to avoid further future litigation. [1194 F, 1196 B-C]

Harmes and Anr v. Hinkson, 50 C.W.N. 895, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1872 of 1970.

From the judgment and decree dated the 24th December, 1969 of the Calcutta High Court in appeal from Original Decree No. 843 of 1966 (Probate) S.S. Ray and S. Ghosh for the Appellant.

V.S. Desai D.N. Mukherjee and N.R. Choudhary for the Respondents.

The Judgment of the Court was delivered by BAHARUL ISLAM, J, This appeal by certificate granted by the Calcutta High Court under Article 133(1) (b) of the Constitution is from a decree dated December 24, 1969 and arises out of a probate suit.

2. The material facts may be briefly stated as follows. One Manindra Chandra Bose (original respondent No. 1 since deceased) and Jogendra Nath Mitra (respondent No. 2 before us) filed an

application before the Subordinate Judge, Alipore, for probate of a will alleged to have been executed by one Ranendra Chandra Bose on November 8, 1952, Jitendra Chandra bose, a brother of the testator entered caveat and filed a written statement and contested the application for probate. The plaintiffs' case was that Renendra died unmarried on November 16, 1952, leaving the alleged will (Exhibit 1) executed on November 8, 1952. Ranendra left behind him three brothers-Jitendra, aforesaid, Gopendra and plaintiff No. 1. Manindra. Manindra and Jogendra (plaintiff No. 2) had been appointed executors of the will. By the will Ranendra bequeathed one-half of his properties to his nephew, Bhabesh, who was the son of his younger brother, Phanindra, who had pre-deceased him, and the remaining half to his younger brother Manindra for life, and after his (Manindra's) death to Bhabesh absolutely. During the pendency of the suit, Jitendra died and his heirs who were substituted, contested the suit.

3. The contentions of the defendants were that Ranendra on November 8, 1952, was not in a physical or mental condition to execute a will; he was in a semiconscious state of mind and had not the testamentary capacity to execute the alleged will. They alleged that the will was brought into existence at the instance, and under the influence of, the propounder Manindra; that the signatures of Ranendra on the will were not genuine and that must have been obtained on blank papers by Manindra who was looking after the properties of Ranendra as well as all litigations in which Ranendra was involved.

4. The trial court found that the signatures of the testator and the attesting witnesses on the will were genuine, and that the provisions of the will was neither unfair nor unnatural. But he dismissed the suit and refused to grant probate of the will on the ground that there were certain "doubts and suspicions about the condition of the testator's mind on 8.11.1952".

5. The plaintiffs filed an appeal before the high Court. The High Court held that "there was no suspicious circumstance relating to the will and whatever little suspicion there was has been satisfactorily explained by the plaintiff", with the result that the High Court set aside the decree of the trial court and granted probate of the will. The judgment and decree of the High Court has been challenged by the appellants before us.

6. Mr. S.S. Ray, learned counsel appearing for the appellants has not challenged the trial court's findings that the signatures of the testator and the signatures of the attesting witnesses on the will were genuine. In other words, the execution and the attestation of the will have not been challenged before us. The only submission of learned counsel is that the "suspicious circumstances"

> surrounding the execution of the will have not been satisfactorily explained by the propounders.

7. This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Successions Act. 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 the signature of the testator as required by law is sufficient to discharge the onus.

Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the disposition made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case 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. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. (See AIR 1964 SC 529, [1959] Suppl. 1 SCR 426 & [1962]3 SCR 195).

8. Needless to say that any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

Learned counsel relied on the decision of this Court in the case of Rani Purnima Devi and Another v. Kumar Khagendra Narayan Dev and Another. In this case the will in question gave the entire property by the testator to a distant relation of his to the exclusion of the testator's widow, sister and his other relations, and even his daughter, who would be his natural heirs, but subject, of course, to the condition that the legatee would maintain the widow and the sister of the testator. The testator's signatures were not his usual signatures, nor in the same ink as the rest of the will; the testator used to sign blank papers for use in his cases in court and he used to send them to his lawyer through his servants; the testator did not appear before the Sub-Registrar for the purpose of registration of the will but the Sub-Registrar sent only his clerk to the residence of the testator for the purpose of registration; there were 16 attesting witnesses who attested the will, but of them, only 4 interested witnesses were examined to the execution of disinterested witnesses. The above are undoubtedly suspicious circumstances, circumstances creating doubt in the mind of the Court. In spite of these circumstances, it was held by the Trial Court that the will was duly executed and attested. On appeal, the High Court affirmed the order of the Trial Court. On further appeal, this Court held that the circumstances were suspicious and were not satisfactorily explained and hence held that "the due execution and attestation of the will were not proved."

9. As in the instant appeal, the judgment of the High Court is one of reversal of the judgment of the Trial Court, we should also examine the law under which the order of the appellate court can be or should be interfered with, inasmuch as learned counsel has cited the two following decisions before us, and urged that the High Court ought not to have interfered with the judgment of the Trial Court. The first case cited is The Bank of India Ltd. and others v. Jamsetji A.H. Chinoy and Messrs. Chinory and Co. In that case the Privy Council has held:

> "The appellate Court would be reluctant to differ from the conclusion of the trial Judge if his conclusion is based on the impression made by a person in the witness box. If however, the trial Judge based his finding and his opinion of the person on a theory derived from documents and a series of inferences and assumptions founded on a variety of facts and circumstances which, in themselves, offer no direct or positive support for the conclusion reached, the right of the appellate Court to review this inferential process cannot be denied."

The other case cited is Madholal Sindhu of Bombay v. Official Assignee of Bombay and others, in which the Federal Court held:

> "It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies and like other tribunals he may go wrong on question of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appeal Court should not lightly interfere with the judgment."

10. Keeping the above principles of law in view let us now turn to the facts of the present case.

Learned counsel for the appellant has enumerated the following 11 'suspicious' circumstances:

> (i) Attempt on the part of the propounder to conceal the real nature of testator's illness.
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> (ii) The propounder failed to tell the date when the testator went to his lawyer (P.W. 3s') house or when the draft was given by the lawyer to the testator.
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> (iii)The draft has not been produced and no explanation has come forth as to what happened to the draft.
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> (iv) No date has been mentioned when the testator sent for his lawyer trough Banqshidhar for corrections in the draft.
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> (v) The diary of P.W. 3 has not been produced.
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> (vi) The senior lawyer (Sudhangshu Babu) has not been examined. The lawyer examined, namely P.W.3, is a partisan witness.
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> (vii)Banqshidhar has not been examined as a witness although he was attending court during the trial of the suit.
>
> (viii)The statement of the propounder, Manindra, that he knew about the will only three or four days after its execution cannot be accepted as true when one of the attesting witnesses, namely P.W. 5, had been told of it a month earlier.

(ix) No body knows what alterations were made in the draft.

(x) The scribe and one of the attesting witnesses are employees, another witness (P.W.4) is a friend and the other attesting witness (P.W.5) is a relation.

(xi) The evidence of the propounder, Manindra, is partly false; he disavows all knowledge of the will.

A careful perusal of the above circumstances shows that they are by no means suspicious circumstances and stand self-explained. Circumstances Nos. (ii) and (iv) are really test of memory. It may be remembered that the witnesses were deposing thirteen years after the execution of the will. It will be difficult for any witness after such a long lapse of time to give the dates when the testator went to the house of his lawyer or when the draft was given by the lawyer to the testator or when the testator sent for the lawyer through Banqshidhar for correction of the draft. With regard to circumstance No. (iii) there is no evidence to show that there was any invariable practice that the draft of a will had to be preserved. No question was put in cross- examination to the scribe (P.W. 1) who perhaps might have been able to say what he had done with it. Similar is the position with regard to the diary of P.W. 3. P.W. 3 who deposed that his diary would show that he had drafted the will was not asked in cross-examination as to whether he at all preserved in 1965 the diary of 1952 or whether he could produce it. With regard to grievances Nos. (vi) and

(vii) we do not see any necessity of calling the testator's employee Banqshidhar, as witnesses in the case. So far as Sudhangshu Babu was concerned, Manindra was not asked as to why he had not been called as a witness; possibly he had died as P.W. 3 spoke of him as "my late senior". With regard to circumstance No. (ix), it may be said that there was no necessity of knowing what alterations had been made in the draft. With regard to the circumstance that the scribe and the attesting witnesses were either employees, or friend or relation of the propounders' group, the answer is simple. No body would normally invite a stranger or a foe to be a scribe or a witness of a document executed by or in his favour; normally a known and reliable person, a friend or a relation is called for the purpose. The same argument applies to P.W.3 who is said to be a partisan witness for the reason that he was the testator's advocate. But there is nothing to show that he was not telling the truth in his deposition. With regard to the circumstances Nos. (viii) and

(x) that Narendra was not telling the whole truth, when he said that he had come to know of the will three or four days after its execution the complaint may be correct, although it was not impossible that he had not been taken into confidence in the matter of the will in his favour, although P.W. 5 had been. Another possibility is that Manindra deposed so in order to avoid cross-examination. In any case this does not appear to be a suspicious circumstance surrounding the execution of the will.

With regard to circumstance No. (i), the submission is that the testator, according to the medical evidence, was at the time of the execution of the will suffering from high blood pressure, diabetes, acidosis, kidney trouble and that he had no food for two days before 8.11.1952. The evidence of P.W.2 Naresh C. Das Gupta who is a medical practitioner is that "Ranen Babu was not taking his meals and usual food", which means, he was taking sick diet with 'hydro- protien' prescribed by him.

But P.W. 2 deposes in cross- examination that "the patient was not in coma .... The patient had talks with me on the last day" which was eight days after the execution of the will when the testator "suddenly" died of coronary thrombosis in the lap of his employee, Banqshidhar. There is no evidence that Ranendra did not have the mental capacity to execute the will. Even D.W. 2 Sailendra Bose who visited Ranendra during his illness, and D.W. 1, Dr. Amal Chakravorty who deposed by perusing the prescriptions, did not depose that Ranendra was in coma or had lost his mental faculty.

12. On the contrary the following circumstances lend strong support to the plaintiff's case of genuineness and valid execution of the will. (1) Gopendra, one of the brothers, who has not been given anything under the will had filed a written statement stating that he "has no objection to the grant of probate inasmuch as the will is executed and attested according to law." (2) The disposition under the will is quite fair and there are no suspicious circumstances in it at all. (3) As there were litigations between the two groups of the brothers, the will was the natural outcome to avoid further future litigation.

13. We do not find any suspicious circumstance surrounding the execution of the will. The circumstances pointed out by learned counsel are not only not suspicious but normal as pointed out above. The rule, as observed by the Privy Council, is that "where a will is charged with suspicion, the rules enjoin a reasonable septicism, not as obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth." (See 500 C.W.N. 895)

14. The trial court was wrong in holding that the circumstances in question were suspicious and the High Court was fully justified in setting aside the judgment of the trial court. We are in entire agreement with the judgment of the High Court.

In the result this appeal fails and is dismissed with costs.

S.R. Appeal dismissed.