

## Civil Appeal

Present :

The Hon'ble Mr. Justice Subhro Kamal Mukherjee

And

The Hon'ble Mr. Justice Tapas Kumar Giri.

Date of judgment: 28.01.2010

F. A. No. 187 of 1998

Netai Pal

Versus

On the death of Smt. Radha Rani Pal

Her legal heir and representative

Smt. Kamala Prasanna Pal.

Points:

Delay- Delay in filing the application for grant of probate whether can be a ground for refusing to grant probate- Indian Succession Act, 1925-S.222

Facts:

This is an appeal against the judgment and decree passed by the Ld. Additional District Judge, First Court, Hooghly in a Probate Suit. By a judgment and decree the learned Additional District Judge dismissed the probate suit on contest, but without any order as to costs. The propounder filed an application for grant of probate of the will of Annakali Pal, who died on September 2, 1977. The application was filed before the Ld. District Delegate at Serampore, Hooghly. As the probate case became contentious, the application was returned to the propounder for re-filing of the said application in the court of the learned District Judge, Hooghly. The learned trial judge dismissed the application for grant of probate holding, inter alia, that there was no cogent evidence to establish that the testatrix was physically fit and mentally alert while she executed the will. The trial judge found that the will was not properly executed and attested and the testatrix had no testamentary capacity. Therefore, the propounder was not entitled to probate. The propounder, being aggrieved by and dissatisfied with the said judgment and decree, rejecting the application for grant of probate, preferred this

appeal. Setting aside the impugned judgment and decree and allowing the application for grant of probate, the High Court,

**Held:** In our country wills are generally not propounded until it becomes absolute necessary to propound them. Mere delay, therefore, cannot be a ground of refusal to grant probate. Moreover, there is no limitation to make an application for probate. The right to apply for probate accrues from day to day so long as the will remains un-probated. The cause of action for an application for probate arises every moment so long as the will remains un-probated. (Paragraph – 26)

It is true that the probate court is a court of conscience. The court is bound to consider the surrounding circumstances, the position of the testatrix and her family relations. While considering the application for grant of probate “The Court is entitled to put itself into the testator’s arm-chair”. (Paragraph – 27)

Cases cited:

41 Indian Appeals 51 (Venkata Narasimha Appa Row Vs. Parthasarathy Appa Row & another)

For Petitioner : Mr. Anit Kumar Rakshit,  
Mr. Pasupati Sana.  
For Opposite Party : Mr. Jiban Kumar Bhattacharya  
Mr. Bimalendu Chattopadhyay,

**Subhro Kamal Mukherjee, J. :** 1. This is an appeal against the judgement and decree dated July 31, 1997 passed by the learned Additional District Judge, First Court, Hooghly in Probate Suit No. 4 of 1992.

2. By the aforementioned judgement and decree the learned Additional District Judge dismissed the probate suit on contest, but without any order as to costs.

3. The propounder filed an application for grant of probate of the will of Annakali Pal, who died on September 2, 1977. The application was filed before the learned District Delegate at Serampore, District : Hooghly and was registered as Act 39 Case No. 198 of 1977. As the probate case became contentious, the application was returned to the propounder for re-filing of the said application in the court of the learned District Judge, Hooghly.

4. This concerns the will of Annakali Pal, widow of Nandalal Pal, of 186 S. C. M. Road, Kumarpara, Baidyabati, District : Hooghly. The propounder claimed that the testatrix executed the

will on May 7, 1977 and appointed the propounder as the executor under the will. The propounder claimed that he was the son of Dulal Chandra Pal and the said Dulal Chandra Pal was adopted by the testatrix as she had no issue. After the death of husband of the testatrix, the testatrix inherited the property of her husband as his natural heir. The sister, nephew and niece of Nandalal did not look after the testatrix and the said adopted son and his wife took all cares of Annakali. Annakali, therefore, by executing the said will, bequeathed all her properties in favour of the said propounder and his wife, Bhagabati. The will was a registered one. The testatrix bequeathed her properties equally in favour of the propounder and his wife and authorized the propounder to perform her last rites.

5. As we have stated herein above, the application for grant of probate was filed before the learned District Delegate at Serampore, but as the probate proceeding became contentious, the

application was returned to the propounder for presentation before the learned District Judge.

6. Unfortunately, the original application was lost from the custody of the learned advocate of the

propounder and all attempts to reconstruct the original application failed. Therefore, the propounder

filed a fresh application in the court of the learned District Judge, Hooghly for grant of probate of the will.

7. The learned District Judge by order no. 1 dated September 10, 1990 issued a notice on the near relations and by order no. 5 dated March 21, 1991, inter alia, accepted the application for grant of probate.

8. The application for grant of probate was contested by Shrimati Radha Rani Pal. She was the

niece of the husband of the testatrix. In substance, in the written statement it was alleged that the will

was not genuine one inasmuch as Annakali had no testamentary capacity to execute the will. It was,

further, contended that there was suspicious circumstances as all the properties were bequeathed to

the propounder and his wife, who were not related to Annakali. It was highlighted that this application for grant of probate was initiated as the objector filed a suit for eviction against the

propounder and his mother and the suit was decreed.

9. In support of the application for probate, the propounder himself deposed as petitioner's witness no. 1. The scribe of the will was an advocate. He deposed as petitioner's witness no.

2. The

petitioner's witnesses nos. 3 and 4 deposed as they were attesting witnesses of the will. One Biswajit Chatterjee deposed as petitioner's witness no. 5; the said Biswajit Chatterjee was a

neighbor of the testatrix.

10. On the other hand, the objector did not depose herself, but her son, Kamala Prasanna Pal, deposed as opposite party's witness no. 1. One Nema Mukherjee, priest of local Panchananda

Mandir, deposed as opposite party's witness no. 2.

11. The will was executed on May 7, 1977 and the testatrix died on September 2, 1977. The learned trial judge dismissed the application for grant of probate holding, inter alia, that there was

no cogent evidence to establish that the testatrix was physically fit and mentally alert while she

executed the will. The trial judge found that the will was not properly executed and attested and the

testatrix had no testamentary capacity. Therefore, the propounder was not entitled to probate.

12. The propounder, being aggrieved by and dissatisfied with the said judgement and decree, rejecting the application for grant of probate, preferred this appeal.

13. The propounder denied that the will was manufactured by him with connivance with the learned advocate, Nema Chandra Adhikary, who was the scribe of the will. The propounder stated

that he did not participate at the time of preparation of the will as everything was done by the testatrix and her learned advocate. He categorically stated that he was not present in the room when

the will was prepared. He lastly denied that the will was a manufactured one.

Nema Chandra Adhikary was a practicing advocate. He stated that in 1977 he used to reside at Sheoraphuli. The house of the testatrix was about 5 to 6 minutes walk from his residence.

14. He knew the testatrix and as per her directions and instructions he prepared the will. The will was

read over and explained to the testatrix by him. The testatrix accepted that the will was correctly

prepared as per her instructions. The will was prepared in one sitting. He visited the house of the

testatrix twice in connection with the preparation of the said will- one day for consultation and the

other day for writing the will. The learned advocate stated that Annakali was weak and she was

incapable of going to the registration office, which was about two and half miles away from the

residence of the testatrix, but she had testamentary capacity to execute the will. This witness identified the left thumb impression of the testatrix in the will and the signatures of the

attesting

witnesses. He denied that the will was manufactured by him in connivance with the propounder in

order to establish interest in the property.

Joggeswar Mukherjee, the petitioner's witness no. 3, stated that he was a neighbor of testatrix whom he addressed as *Boudi*. The said witness had a shop very near to the house of the

testatrix. The testatrix used to get her cloths stitched from his tailoring shop. He stated that the

testatrix put her left thumb impression in the will in his presence. The testatrix told her that she was executing a will. He stated that the scribe read over the contents of the will. He stated that the learned advocate, who scribed the will, brought the stamp pad to enable the testatrix to put her left thumb impression in the will. He denied that there was any collusion in preparing the will.

15. He, also, stated that the testatrix put her left thumb impression and the said left thumb impression was identified by his pen as *bakalmadar*.

Lakshmi Kanta Malik was the petitioner's witness no. 4. He was, also, an attesting witness. He was, also, a neighbor of the testatrix. He stated that testatrix, her learned advocate and the two attesting witnesses were present at the time of execution of the will and none else was inside the room.

16. Biswanath Chatterjee, the petitioners' witness no. 5 was a neighbor of the testatrix. He stated that testatrix expressed her intention to execute a will. He was informed by the testatrix himself that she has executed a will on her own will. She denied the suggestion that the testatrix did not execute the will.

Kamala Prasanna Pal, the son of the objector, who deposed as opposite party's witness no. 1, claimed that testatrix was his grand mother. He admitted that the father of the propounder and his family members used to reside in the house of the testatrix. After the death of the father of the propounder, his family members continued to reside in the said house. He admitted that Annakali was a child-less widow. Still, no blood relation used to reside with the testatrix during her life time.

He stated that he met Annakali about 2-3 days before her death. He stated that her attitude and behavior was normal when he met her even for the last time. She talked to him in normal ways. He admitted that for about 10-12 years before the death of Annakali, the propounder, his mother and his wife used to live with the testatrix in the said house. The said witness stated that she was not present at the time of death of testatrix. He could not indicate that who her attending physician was.

17. He stated that he had no paper to establish that he has ever purchased any medicine for the testatrix and even the death certificate was not with him.

18. Nema Mukherjee was the priest of Panchananda Temple of the locality. He advised the testatrix to go to the house of the objector and to give everything to the objector, but the testatrix refused to go her leaving her husband's house. He said that he never heard that testatrix did anything for distribution of her property. He said that a week before her death he saw her last.

19. She

was sick, but she used to cook herself. He was incapable of saying assertively as to whether the testatrix was mentally fit or not. He stated that the objector was a kumbhakar and he was the priest of Panchananda Mandir, which belonged to kumbhakar community; therefore, he had good relationship with the objector.

In this case, the propounder of the will proved the execution and attestation of the will. The objector stated that the will was a manufactured one and the testatrix had no testamentary capacity to execute the will. The burden was heavily on the objector to prove that the will was not a genuine will or that the testatrix had no testamentary capacity. The objector took no pain to prove that the will was not executed by the testatrix or that she had no testamentary capacity to execute the will.

20. No documentary evidence was filed by the objector concerning the testamentary capacity of the testatrix. Execution of the will was proved. The left thumb impression of the testatrix in the will was proved by one of the attesting witnesses, petitioner's witness no. 3.

21. Nemaï Chandra Adhikary was a practicing advocate. He categorically stated the will was prepared under the instructions and directions of the testatrix. After the will was prepared it was read over and explained to the testatrix. He stated that the testatrix had testamentary capacity to execute the will. The witnesses cited by the propounder were not even effectively cross-examined

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on behalf of the objector. It is surprising that he should have prepared a will without obtaining instructions from the testatrix.

22. When the natural heirs are deprived, prudence requires reason for denying the benefit to them. Absence of reason may not invalidate a will, but it may raise suspicion. In the case in hand the testatrix in the will in clear language stated that the natural heirs did not keep contact with her for long time nor they looked after her during her old age.

23. The will was executed on May 7, 1977 and the testatrix died on September 2, 1977. The will was registered. The testatrix was incapable of going to the registration office, which was about two and half miles away from his house. Therefore, the Sub-registrar came to the house of the testatrix. The will was presented for registration before the Sub-registrar in the residence of the testatrix. The objector was her near relation. She was, also, residing in the locality. The visit of Sub-registrar must have itself made it known to everybody in the locality. It is impossible to believe that some one, who had some concerns about the testatrix, could not know for at least four

months that she executed a registered document by calling the Sub-Registrar in her house.

24. The

testatrix was alive for about four months. No one raised any question about the genuineness of the will.

25. The learned Judge thought that there was some delay in propounding the will. In fact, the application for grant of probate was filed in 1977. After it became contentious, it was filed in the

court of the learned District Judge in the year 1990. The delay in presenting the application in the

court of the learned District Judge has been sufficiently explained by the propounder. The application for grant of probate was lost from the custody of the learned advocate. The application

filed by the objector in the court of the learned District Delegate was, also, not available. The learned District Judge allowed the prayers of both sides and accepted the fresh application for grant

of probate and the objector was, also, exempted from producing the copy of the original application

filed on her behalf in the court of the learned District Delegate.

26. In our country wills are generally not propounded until it becomes absolute necessary to propound them. Mere delay, therefore, cannot be a ground of refusal to grant probate.

Moreover,

there is no limitation to make an application for probate. The right to apply for probate accrues

from day to day so long as the will remains un-probated. The cause of action for an application for

probate arises every moment so long as the will remains un-probated.

27. It is true that the probate court is a court of conscience. The court is bound to consider the

surrounding circumstances, the position of the testatrix and her family relations. While considering

the application for grant of probate "The Court is entitled to put itself into the testator's arm-chair".

**(Venkata Narasimha Appa Row Versus Parthasarathy Appa Row another reported in 41**

**Indian Appeals 51)**

In this case, the objector has failed to establish that the testatrix had no testamentary capacity to execute the will. On the contrary, the propounder has proved due execution and the

attestation of the will by producing the scribe, who was a practicing advocate, and the attesting

witnesses. We find no reason to reject the testimony of these witnesses, particularly in the background of the circumstances that it was registered will. We are convinced that the will was not

executed in a clandestine or surreptitious manner. It was alleged that the testatrix had no mental

capacity, but the son of the objector, who deposed as the principal witness on behalf of the objector,

admitted that when he last met the testatrix about a week before her death, he found her normal.

28. The testatrix talked with him in normal ways. Therefore, it can be safely concluded that the testatrix

was capable of understanding that she was executing the will.

29. In the aforementioned circumstances, we hold that the learned trial judge was wrong in holding the testatrix has no testamentary capacity to execute a will. In order to prove the due execution and attestation of the will two attesting witnesses were produced. They proved that the

testatrix was mentally alert. All the ingredients of Sections 63 and 270 of the Indian Succession Act

as, also, of Section 68 of the Indian Evidence Act have been complied with.

30. We, therefore, set aside the impugned judgement and decree and allow the application for

grant of probate. Let probate with the will annexed be issued in favour of the propounder.

The appeal is, thus, allowed.

There will be no order as to costs.

(Subhro Kamal Mukherjee, J.)

**Tapas Kumar Giri, J. :**

I agree.

(Tapas Kumar Giri, J.)