

**In the Court of the Additional District & Sessions Judge, 2nd Court,
Bongaon, Dist.- North 24 Parganas**

Before

Shri Pradip Kumar Adhikary, WBSJ,
J O Code (UID No.) - WB916,
Additional District & Sessions Judge, 2nd Court,
Bongaon, Dist.- North 24 Parganas.

**CNR No.- WBNP 0600 1788 2013
OS No.- 39 of 2015**

**Durga Chakraborty
v.
Gopal Chakraborty and others**

Order No.- 13
20/02/2025

Both the contesting parties have filed hazira through Ld. Advocates respectively.

The case record is taken up for hearing of the petition dated 04/09/2024 filed by the plaintiff/petitioner.

In the said petition the plaintiff/petitioner has stated that P.W.- 03 Sukumar Das is attesting witness of the WILL executed by Bela Rani Chakraborty and he signed on the WILL in Bengali as attesting witness as well as identifier of testatrix. The P.W.- 03 in his deposition taken by the Ld. Commissioner has put his signature in English; he denied to sign in Bengali. In the petition it is stated that it is very much important to collect specimen signature of the said attesting witness as well as identifier in Bengali for comparison of his signature in the WILL by forensic test. In the above circumstances the plaintiff/petitioner has prayed for passing necessary direction upon the P.W.- 03, Sukumar Das to appear before the Court and provide his Bengali signature for forensic test.

Heard.

Although the defendants/respondents have not filed any written objection against the above mentioned petition, their Ld. Advocate has raised vehement objection in allowing the petition. He has pointed out that almost same kind of petition has already been rejected by this Court. Moot question of this case is whether the alleged WILL was executed by Bela Rani Chakraborty and in order to prove the same the plaintiff/petitioner has already examined P.W.- 03, one of the attesting witnesses. Since the attesting witness has not deposed in the tune of the plaintiff/petitioner, the instant petition is filed in order to drag the case in no where. In the above circumstances the Ld. Advocate has prayed for rejection of the application with cost.

Considered the materials on record.

It appears that on 05/12/2023 the plaintiff/petitioner filed a petition paying for passing necessary order for collecting signature of the P.W.- 03 Sukumar Dey in Bengali either in person before the Court or in any way as the Court may deem fit and proper.

After hearing of both sides the said petition was disposed of on 25/07/2024 by delivering the following order :

Upon such consideration and hearing it appears that the Hon'ble Court has been pleased to allow the prayer for recording evidence of witness Sukumar Das through commission as per provision of order XXVI rule 01 CPC at the cost of the petitioner and also has been pleased to direct this Court to make expeditious disposal of the case and to make every endeavour to conclude the entire proceeding within a period of six months from the date of communication of the order.

Thereafter, Smt. Jayita Sarkar has been appointed as Deposition Commissioner for recording evidence of witness Sukumar Das. Subsequently, the witness Sukumar Das has

been examined and cross-examined through commission.

It is pleaded by the plaintiff/petitioner that at the end of deposition the witness was requested to sign on deposition in Bengali but he refused to do so which the defendant/respondent has denied flatly. Moreover, a witness cannot be compelled to put his signature either in English or in Bengali or in any other language whereas neither any such prayer was ever made before the Court nor any such direction was given either by the Hon'ble Court or by this Court during issuing writ of commission.

In the instant petition there is no specific prayer for comparing the signature of the witness by any hand writing and signature expert.

At this juncture there is no reason for passing order directing the witness Sukumar Das whose evidence was taken through commission to give his specimen signature in Bengali. Hence, the instant petitioner is considered and rejected.

Thereafter, on 04/09/2024 the instant petition was filed.

The crux of the case is whether Bela Rani Chakraborty executed the impugned WILL in favour of the plaintiff/petitioner.

In order to prove due execution and attestation of the said WILL the plaintiff/petitioner adduced Sukumar Das. In his deposition he has categorically stated that he did not put signature as Sukumar Das as found in the WILL. He also denied that he identified the LTI of Bela Rani Chakraborty in the WILL.

So, it is clear that the attesting witness has repudiated his signature in the WILL.

It is settled law that mere proof of the signature is also not enough. In order to prove due attestation of the WILL, the proponent will have to prove that testator has signed the WILL, that too, in the presence of two witnesses and they themselves signed the same in the presence of the testator.

In ***Girja Datt Singh v. Gangotri Datt Singh*** : AIR 1955 SC 346 the Hon'ble Apex Court has been pleased to observe that

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 signature to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. S.68, 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.

So, taking Bengali signature of attesting witness and comparison of the same with his alleged signature in the WILL does not take the plaintiff/petitioner any where. It will be an abuse of process of the Court.

In Law of Evidence by Sir John Woodroffe and Syed Amil Ali - 17th Edition - Vol.2 at page 3028, it is observed as follows:

"The fate of a document is not necessarily at the mercy of the attesting witnesses. The mere fact that the attesting witnesses to a document repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. The principle is well-settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the court, and accordingly disregard their testimony and pronounce in favour of the document. The section presupposes that the witness is actually produced before the court, and then, if he denies execution, or his memory fails, or if he refuses to prove, or turns hostile, other evidence can be admitted to prove execution. Before the section can be applied it is necessary to comply with S.68, Evidence Act and to call as a witness one at least of the attesting witnesses."

In Law of Evidence by Sarkar - 16th Edition - Vol.1 at page 1302, referring to Section 71 of the Indian Evidence Act, it is observed as follows:

"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 bye to the mandate of law relating to proof of execution as a will.

The force of the rule is spent when the attesting witness is called. It is not necessary that he should speak favourably. If he positively denies execution, or his memory fails or he pretends not to recollect, it entitles the party to give other evidence of execution. This section lays down the mode of proof when attesting witness denies execution. Where attesting witness denies execution, forgets, refuses to prove or is hostile, other evidence is admissible to prove the document. It may be proved in the manner of documents not required by law to be attested. It must however be remembered that S.71 comes into play only when all the attesting witnesses alive have been called or every attempt made to enforce their attendance and they deny or do not recollect execution. When only one attesting witness is called and he is not believed, it cannot be said that the provisions of S.68 have been complied with and no further evidence of execution and attestation is necessary."

Wigmore on Evidence - Vol. IV at page 720, under Note 1302, it is observed as follows:

"Accordingly, it is not necessary, as a part of the rule, that he should testify in favour of execution. The rule is satisfied by calling him, i.e., by making his testimony available for the trial. If his testimony fails to evidence the execution, the present rule says nothing about the consequences - whatever any other rule may say. The present rule's force is absolutely spent when the witness is produced for examination.

Here also policy agrees with principle; for the practical working of the rule, if it required that the witness should not only testify but testify favorably, (i.e., if the party desiring to prove execution must fail if the attesters failed to prove it) would be unfair and disastrous, especially in testamentary causes."

At page 721, it is observed as follows:

"Accordingly, the failure of the attester, from lack of memory, to prove execution, is not in itself any breach of the present rule; and, though the proponent has still to prove the execution in some sufficient way, he is no longer hampered by any rule about attesting witnesses."

At page 723, it is observed as follows:

"For the same reason, the attester's positive denial of the facts of execution, contradicting the statements implied or expressed in his attestation, leaves the proponent still free to prove by other testimony, if he can, the facts of due execution - a permission demanded not only by principle but also by policy, inasmuch as the proponent might otherwise be defeated of his rights by a corrupt attester."

In *Ittoop Varghese v. Poulouse* : 1974 K.L.T. 873 it has been held that

When the court is satisfied that the witnesses deliberately and falsely denied that they attested the will, the court is entitled to look into the other circumstances and the regularity of the will on the face of it and come to the conclusion on the question of attestation.

In ***Chacko v. Elizabeth John*** : 1997 (1) K.L.T. 739, it has been held that

Merely because an attesting chooses to deny attestation of the document, the propounder of the will should not be without remedy. When the court is satisfied that witnesses deliberately and falsely denied that they attested the Will, court is entitled to look into the other circumstances and the regularity of the will on the face of it and to come to the conclusion on the question of attestation. The probate court is not powerless to declare in favour of the Will where attesting witnesses or some of them prove hostile and unreliable, if from other evidence on record and the circumstances taken as a whole, the court is in a position to hold that the Will was duly executed and attested. Inadequacy of the evidence of the attesting witnesses should not stand in the way of granting probate.

Law is thus clear on the point. Even assuming that the attesting witnesses do not

support the propounder's case, the propounder has to adduce other items of evidence or to rely on circumstances to prove that the WILL was duly executed by the testator. To put it differently if the attesting witnesses for reasons best known to them chose not to support the propounder in proving the due execution of the WILL, it is not as if that the propounder has no other option. Section 71 come to his aid and enables him by circumstantial evidence or other evidence to prove the due execution.

In the above circumstances the Court is of considered opinion that the instant petition is devoid of any merit and is not sustainable in law. The petition has been filed only to drag the case that has already undertaken more than eleven years of journey since its institution on 25/11/2013. Hence, the petition is rejected on cost of Rs. 3,000/-. The plaintiff/petitioner is directed to pay 50% of the cost amount to the defendant/respondent and remaining 50% to the fund of SDLSC, Bongaon.

Since the Hon'ble Court has already been directed to make expeditious disposal of the case and to make every endeavour to conclude the entire proceeding within a period of six months from the date of communication of that order and since that stipulated period has already been expired, both sides are directed to take appropriate steps for proceeding the case expeditious in compliance with the solemn mandates of the Hon'ble Court.

Henceforth this case will be heard consecutively on each and every date till its logical conclusion.

To 05/05/2025 for payment of cost by the plaintiff/petitioner, further evidence on behalf of the plaintiff/petitioner, if any and then evidence on behalf of the defendant/respondent.

Typed by me

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