

GAHC010185432024



2026:GAU-AS:4034

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Test.App./10/2024

SABITRI GOSAI
W/O SRI ASHOK KUMAR GOAI @ GOPAL GOSAI,
RESIDENT OF MEHERPUR, SILCHAR PO AND PS SILCHAR DIST CACHAR
ASSAM 788009

VERSUS

MOTESWARI GOSAI AND ORS
W/O LATE SURENDRA GOSAI
RESIDENT OF ITKHOLA, SILCHAR PO AND PS SILCHAR, DIST CACHAR,
ASSAM 788001.

2:SMTI. PUSHPA BHARATI
W/O LATE SHIBNANDAN BHARATI

RESIDENT OF ITKHOLA
SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001.

3:SMTI CHANDRA PRAVA GIRI
W/O SRI PAPPU GIRI

RESIDENT OF ITKHOLA
SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001.

4:SMTI. PRATIMA GOSAI
D/O LATE SURENDRA GOSAI

RESIDENT OF ITKHOLA

SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001.

5:SRI SANJAY GOSAI
S/O LATE SURENDRA GOSAI

RESIDENT OF ITKHOLA
SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001.

6:SMTI. SEEMA GOSAI
W/O LATE VINOD GOSAI

RESIDENT OF ITKHOLA
SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001.

7:SRI VANSH GOSAI
S/O LATE VINOD GOSAI

RESIDENT OF ITKHOLA
SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001.
TO BE REP. BY RES. NO. 6

8:SMTI. SUSMITA GIRI (GOSWAMI)
W/O SRI DIPU GIRI

RESIDENT OF ITKHOLA
SILCHAR PO AND PS SILCHAR
DIST CACHAR
ASSAM 788001

BEFORE
HONOURABLE MR. JUSTICE SANJEEV KUMAR SHARMA

Advocate for the appellant : Mr. S.D. Purkayastha , Advocate
Advocate for the respondents : Mr. G.N. Sahewalla, Sr. Advocate
Ms. S. Todi, Advocate.
Date on which judgment is reserved : **06.03.2026.**
Date of pronouncement of judgment : **20.03.2026.**
Whether the pronouncement is of the : N/A
operative part of the judgment ?
Whether the full judgment has been : Yes
pronounced?

JUDGMENT AND ORDER (CAV)

- 1.** Heard Mr. S.D. Purkayastha, learned counsel for the appellant, and Mr. G.N. Sahewalla, learned Senior Counsel, assisted by Ms. S. Todi, learned counsel for the respondents.
- 2.** This testamentary appeal No. 10/2024 and Cross Objection No. 20/2024 has been preferred against the Judgment & Order dated 03.06.2024, passed by the Court of Additional District Judge, Cachar, Silchar, in Test Suit No. 1/2016.
- 3.** The facts giving rise to the instant appeal may be briefly stated. The suit had arisen out of an application for granting probate under the Hindu Succession Act with respect to the last Will executed by Late Surendra Gosai, S/o. Late Shib Baran Gosai of Itkhola, Silchar Town, PS-Silchar, Dist. Cachar died on 08.06.2011 at his residence at Itkhola, Silchar Town. At the time of his

death, the deceased left the persons who would have been his heirs under the said act in case of intestacy namely Smt. Moteshwari Gosai, Smt. Pushpa Bharati, Smt. Chandra PravaGiri, Smt. Pratima Gosai, Sri Sanjoy Gosai, Smt. Seema Gosai, Sri Vansh Gosai and Smt. Susmita Giri. In the said application, it has been stated that prior to his death, the said deceased on 12.08.2008 made and published his last Will regarding his property as mentioned in the said Will whereby he left and bequeathed his estate and effect thereof as indicated therein. It is further stated that aforementioned Will which was executed by the Testator, Surendra Gosai in good health and mind, made disposition of his properties described in schedule of the probate petition in favour of Sri Abhijit Goswami, son of Sri Ashok Kumar Goswami @ Gopal Gosai, the brother of the testator. Such disposition of the schedule property by way of bequeath through the aforesaid Will was done by the Testator keeping in mind his earlier commitment when said Sri Abhijit Goswami then minor suffered head injury in an accident and by the aforesaid Will, the petitioner i.e. the mother of the Sri Abhijit Goswami was appointed executor of the aforesaid Will till the minority of said Sri Abhijit Goswami and after the majority of Sri Abhijit Goswami his mother i.e. the petitioner and Sri Abhijit Goswami were by this said Will, appointed executors jointly and severally and to apply for the grant of probate after the death of aforesaid Surendra Gosai. It is also stated that value of the estate left behind by the said deceased will be Rs.4,80,000/- approximately. The petitioner Smt. Sabitri Gosai, is the sole executor named in the Will as such she is entitled to apply for probate of the said Will. Thereafter, the said application was registered as Misc. Probate Case No. 5/2015 and subsequently the objectors namely, Monteshwari Gosai and others filed their objections stating *inter alia*, that the probate case is not maintainable and there is no cause of

action and the alleged Will is a false, fabricated and manufactured etc.

4. It was also stated that husband of the petitioner i.e. Ashok Kumar Gosai is the youngest son of Sib Baran Gosai whereas Surendra Gosai is the eldest son of Sib Baran Gosai. On the death of Sib Baran Gosai, there were many litigations amongst the sons and outsiders. The eldest son of Sib Baran Gosai i.e. Surendra Gosai used to look after the litigations for an on behalf of the brothers. That Surendra Gosai had an attack of Brain stroke in 2005 and as a result, his attendance in Courts became limited as most of the times he was lying in bed and from then onwards his affectionate and loving youngest brother, Ashok Kumar Gosai @ Gopa Gosai used to look after him and also helped him by taking steps in various litigations and Surendra Gosai used to sign blank sheets and papers for using the same in various litigations and taking the advantage of the situation created the alleged Will on the signed blank sheets which Surendra Gosai usually used to handover to his youngest brother for taking due steps in various litigations. It has further stated that Smt. Pramila Goswami, wife of Uday Shankar Goswami and others filed T.S. No. 21 of 2008 in the Court of Civil Judge, Silchar against Surendra Gosai and his brothers and sisters, including Ashok Kumar Gosai @ Gopal Gosai for declaration of title, confirmation of possession and other reliefs regarding the lands of 2nd RS Patta no.12, dag nos. 98/99/100 and 97 of Mouza-Ambicapur Pt.XI. The suit was later transferred on 10.03.11 and the compromise petition was filed on 15.12.2010 wherein the suit patta, dag land fell in the share of Surendra Gosai. Hence, he could not bequeath the alleged property to the son of Ashok Kumar Gosai in between a pending proceeding. Moreover a Will cannot be legally executed in the name of a minor unless he/she is properly represented. The petitioner is not entitled to

probate on the basis of a forged and fraudulent Will and hence, prayed to reject the same.

5. The learned Trial Court, after discussing the evidence on record, decided the Issue No. 1 as regards the maintainability of the suit against the plaintiff by holding that the same is barred by limitation, and therefore accordingly decided Issue No. 6, holding that the petitioner is not entitled to any relief. The rest of the issues, though, were found in favor of the plaintiff.

6. The points that are required to be determined as follows:-

1) Whether the application for probate was barred by
limitation?

2) Whether the Will was proved to have been duly and validly
executed?

7. On the point of limitation, learned counsel for the appellant submitted that since the beneficiary of the Will was a minor at the time of the testator's death, they had waited till the beneficiary attained majority and thereafter applied for probate. It is not the case of the appellant that the execution of the Will was not known to them, or that the Will was discovered subsequently much later.

8. Learned counsel has referred to Section 223 of the Indian Succession Act, which reads as follows:

"Persons to whom probate cannot be granted.- Probate cannot be granted to any person who is a minor or is of unsound mind [nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made [by notification in the Official Gazette,] by the [State Government], in this behalf]"

9. However, the aforesaid contention cannot be accepted, inasmuch as it is the executor of the Will who is required to apply for probate, and in the instant case, the said executor is the mother of the beneficiary, who was very much an adult person, who was also the plaintiff and also deposed as PW-1, wherefrom it appears that she had full and contemporaneous knowledge regarding the execution of the Will and in this regard, it would be apposite to quote Section 222 of the Indian Succession Act, which reads as follows:

"Probate only to appointed executor.- (1) Probate shall be granted only to an executor appointed by the Will

(2) The appointment may be express or by necessary implication."

10. Other than the above plea of minority of the beneficiary, no other explanation has been offered for the delay in preferring the application for probate, either in the said application or by way of a separate application under Section 5 of the Limitation Act.

11. It has been held by the Hon'ble Apex Court in *Ramesh Nivrutti Bhagwat Vs. Dr. Surendra Manohar Parakhe*, reported in (2020) 17 SCC 284, that the Succession Act does not prescribe a specific period of limitation for the grant of probate, and such proceedings are therefore covered by Article 137 of the

Limitation Act, which requires such application to be filed within three years from the date when the right to apply accrues.

12. In the instant case, since the alleged execution and existence of the Will was known to the appellant beforehand, the right to apply accrued immediately upon the death of the testator, which occurred on 08.06.2011, whereas the application for probate was made on 17.03.2015, thereby that is, after a delay of about nine months, after expiry of the period of limitation for which there is no valid explanation. Therefore, the learned Trial Court rightly decided the issue against the plaintiff by holding that the suit is barred by limitation.

13. Learned Senior Counsel for the respondent has submitted that the execution of the Will is clouded by suspicious circumstances and that the proponent/appellant had failed to remove those suspicions, and therefore, on that count, the finding of the learned Trial Court on Issues Nos. 2 and 3 to the effect that the Will was duly and validly executed cannot be sustained.

14. Learned senior counsel has taken the Court through the evidence of P.W. Nos. 1, 2 and 3, to point out the various inconsistencies and contradictions contained therein.

15. I have perused the evidence on record. Amongst other submissions, it has been urged that the testator was not in a fit state to execute the Will. In this regard, it is submitted that it is an admitted position, which is evident from the cross-examination of the PWs, that the testator had suffered a brain stroke in the year 2005, and various suggestions were made to the PWs in this direction

to show that the testator lacked sufficient capacity to execute the Will. However, no medical evidence has been brought to the fore to establish that the testator was mentally or physically incapacitated from executing the Will.

16. DW1 had exhibited two certificates by way of Exhibit A and Exhibit B. Exhibit A is a disability certificate issued by the concerned authority, which only shows orthopedic disability, whereas Exhibit B is a concession certificate issued for the purpose of train travel, which shows the handicap of the testator to be permanent and cause of loss of functional capacity as hemiparesis(L). Moreover, it has been deposed by the PW that the testator had filed a new civil suit as plaintiff after execution of the Will, and had also submitted his evidence on affidavit and was also duly cross-examined in Court, which could not have happened unless the testator was both physically and mentally capable. Therefore, these two exhibits do not in any way show that the testator was incapable of executing the Will and therefore, I do not find any force in the said submission.

17. With regard to the evidence on record, it is noticed that the mother of the beneficiary/appellant, who deposed as PW-1, stated during cross-examination that she was not present at the time of execution of the Will. Therefore, none of her evidence relating to the due execution of the Will by the testator is of any significance. Although she had stated that the Will was read out to her, as she could not read Bengali, no other witness, including the scribe (PW-3), mentioned anything about reading out the Will to PW-1 and therefore, it would appear that the petitioner No.1 had no knowledge of the contents of the Will. PW-2 stated in his chief regarding the due execution of the Will, but during

cross-examination, he stated that the testator signed the Will after he, as an attesting witness, had put his signature thereto, which is contrary to the procedure prescribed by law.

18. At this stage, it would be relevant to refer to the essential requirements to prove a Will.

(i) Section 68 of the Evidence Act reads as under:

“68. Proof of execution of document required by law to be attested - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness 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:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

(ii) Section 63 of the Succession Act prescribes the mode and method of proving a Will and, to the extent relevant, it reads as under:

“63. Execution of unprivileged Wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a).....

(b).....

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary"

(iii) Section 71 of the Evidence Act states as follows:

"71. Proof when attesting witness denies the execution - If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence".

19. From a plain reading of Section 63(c) of the Succession Act, it is evident that the testator or his representative is the first person who is required to sign the Will, and it is only thereafter that the attesting witnesses are required to sign the Will. In any case, until and unless the testator has signed the Will, there is no question of attestation by the attesting witnesses, inasmuch as it is not only the body of the Will but also the signatures of the testator that are required to be attested by the attesting witnesses. In the instant case, it has been admitted, as pointed out before, that the attesting witness, that is PW-2,

did not attest any signature of the testator which is against the mandate of the law, and since the other attesting witness has not been examined, it cannot be said that the due execution of the Will has been proved by the evidence of at least one attesting witness. Although the PW-3, who is the scribe of the Will, has deposed to the due execution of the Will, he is not an attesting witness, and the Will cannot be said to have been proved solely on the basis of the evidence of PW-3.

20. Learned counsel for the appellant has placed reliance upon a decision of the Hon'ble Apex Court in ***Dhani Ram (Died) through LRs & Ors Vs. Shiv Singh***, reported in ***2023 Supreme (SC) 1014***, wherein at paragraph 26 it has been held as follows:

“26. Section 68 of the Evidence Act requires at least one attesting witness to the Will to prove its execution in terms of Section 63 of the Succession Act, but it is clear that neither Lok Nath Attri nor Chaman Lal passed muster in satisfying this requirement. In consequence, Section 71 of the Evidence Act had a role to play in the matter, as one attesting witness, Chaman Lal, denied the very execution of the document in his presence while the other attesting witness, Lok Nath Attri, did not establish its execution in terms of the legal mandate. It was, therefore, incumbent upon Dhani Ram to lead other evidence to prove the execution of the Will by Leela Devi. However, neither Ghanshyam Dutt Sharma, the document writer who scribed the Will, nor anyone from the Registrar's Office at Kasauli were examined to prove its execution.”

21. In the aforesaid case, the Apex Court noticed that the witness named Lok Nath Attri, even in his examination-in-chief never deposed to have signed the Will in the presence of the testator, which was against the mandate of the law and the same was treated as a denial, thereby attracting Section 71 of the

Evidence Act. But in the instant case, PW-2 had clearly deposed to the due execution of the Will in his examination-in-chief, wherein he deposed as follows:

"As such, in August 2008, Suren Gosai got prepared a Will in respect of eight Kathas of land in Meherpur PS Silchar. He bequeathed such land in favor of Sri Avijit Goswami. Such Will was prepared by Sri Tamal Singha, Advocate Clerk, at his instruction, and thereafter he executed the Will in the presence of myself and his brother, Sri Rohit Gosai in good health and mind. Before that, he himself gone through the contents of the said Will, and it was also read over to him by the scribe, Sri Tamal Singha in our presence. There was no coercion or undue influence, said Suren Gosai, as the said Will was executed by him at his residence."

22. PW-2 also identified Exhibit 1 as the said Will, and the signatures of the testator, who signed in his presence, and also the signature of the other attesting witness, Sri Rohit Gosai, as well as his own signature as an attesting witness.

23. Therefore, it can hardly be said that PW-2 denied the execution of the Will or that he does not recollect the execution of the document. It is only during his cross-examination that the defendants extracted from the PW-2 that he signed the Will before the testator did. In such a circumstance, the plaintiff cannot be allowed to improve his case or cure such a fatal defect in the evidence of the attesting witness by the evidence of other witnesses by resorting to Section 71 of the Evidence Act. It is not a case of omission to state a particular fact, which can be supplied by subsequent witnesses but a clear case of contradictory evidence. The facts are clearly distinguishable from the cited decision.

24. If Section 71 of the Evidence Act is to be had resort to in every case

where a party disputing the due execution of the Will manages to extract, during cross examination, a fact favourable to such party or disfavourable to the other party, then Section 68 of the same Act would be rendered largely otiose.

25. Furthermore, PW-2 had categorically stated during cross-examination that other than himself and the testator and PW-3, no other person was present at the time of execution of the Will, although PW-3, in his evidence, had stated that the other attesting witness, Rohit Gosai was present at the same time. This contradictory nature of the plaintiff's evidence also creates doubt about the due execution of the Will. Moreover, the fact remains that the Will was sought to be probated long four years after the death of the testator for no legally viable reason, which itself creates suspicion. PW-2 although had identified the Exhibit 1 Will in his evidence on affidavit, stated during cross-examination that the same was made on a stamp paper, whereas upon examination of the same, as well as from the deposition of the witnesses, it is seen that the Will was made on a green paper, commonly called "13-inch paper", and not on a stamp paper.

26. All of this imparts a ring of truth to the contentions of the defendant/respondents that the Will was made up on pre-signed papers meant for submitting hazira/applications before the Courts in pending litigations involving the testator.

27. In view of the above, I hold that the Will in question was not proved to have been duly and validly executed.

28. Hence, the findings of the learned Court below on the aforesaid issue

cannot be sustained. In the result, the appeal is devoid of merit and accordingly stands dismissed and the Cross Objection stands allowed.

29. Send back the TCR.

JUDGE

Comparing Assistant