

land measuring 1 katha 4 lechas covered by Dag No. 741 of K.P. Patta No.613 of Sahar Guwahati, Part-II of Mouza Guwahati in favour of the petitioners Padmini Choudhury and her elder sister mainly Parbati Medhi @ Putul Medhi. However said Putul @ Parbati had expired leaving her sons namely Dhruva Medhi and Pradip Medhi for which they have filed the petition for granting Probate along with Padmini Choudhury.

Late Kuki Bala Das has got four sons and two daughters. However, one of the son namely Kamala Das died unmarried, but her surviving sons namely Kabilal Das, Umesh Das and Dipak Das who were well established failed to take care of their mother during her old age time and at the time of suffering from illness. Accordingly the testatrix Kuki Bala was provided all care and attention at the time of her old age. For the service rendered by the daughters of testatrix, she had on her own desire made and executed her last Will and testament in respect of property as mentioned in schedule of the petition in favour of her two daughters on 23.09.94 in presence of one Surendra Kumar Pathak and Bijon Chandra Das. However the testatrix expired on 23.09.2000 at Guwahati in her fixed place of abode. Moreover one of the beneficiary of the Will Smti Parbati Medhi has also expired on 15.08.09. Accordingly, the petitioner has filed the petition for granting Probate in respect of the Will executed by the testatrix in a sound and disposing state of mind.

2) The petition was however objected by the O.Ps. by filing their written statement. The O.Ps. are the three surviving sons of the testatrix and they are by name Rabilal, Umesh Das and Dipak Kumar Das.

They contended that Probate Proceeding is not maintainable and the same has been made by suppressing material facts for illegal and wrongful gain. The Proceeding has been initiated to get the Probate of the alleged Will by manipulating facts. The testatrix was not physically and mentally sound at the time of execution of the alleged Deed. Moreover, the signature of the testatrix is disputed one and get the same registered in collusion with the officials of the Sub-Registrar, Guwahati. The testatrix has little knowledge in English and she never executed the Will which was written and typed out in English.

3) They vehemently denied the averment of the petition terming it misconceived, concocted and untrue. According to them one Lakshi Kanta Das and the testatrix Kuki Bala Das, during her life time jointly owned and possessed the aforesaid plot of land measuring 1 katha 4 lechas with exclusive right and title. However, after partition only one part of land measuring 5½ lechas same to the share of testatrix Late Kuki Bala. There was an Assam type house consisting two rooms over same 5½ lechas of land with GMC Holding No. 000011 standing in the name of the husband of the testatrix. The house was built by the father of the O.P. during his life time and after his death and also after the death of said Kuki Bala, the O.P. No.2 was in possession of the said Assam type house. They also disputed that the testatrix died on 23.09.2000, but in fact, the testatrix late Kuki Bala Das, the mother of the O.Ps. and the petitioner Parbati died on 23.09.03. They further contended that late Kuki Bala Das has three surviving sons and son Rabilal Das is a retired employ of ASEB. Sri Umesh Das and Dipak Das are small businessmen. Smti Parbati Medhi was given in marriage to one Surendra Kanta Medhi, an employee of N.F.Railway and was a resident of Rajaduwar, North Guwahati. However in 1986, after the death of said Surendra Kanta Medhi, Smti Parbati Medhi and her three children namely Nima, Dhruva and Pradip came to stay at the house of late Kuki Bala Das in the house of O.Ps. till she had received the terminal benefit of her late husband Surendra Kanta Medhi. Later on, they left the house of Kuki Bala Das in the year 1989/90 to North Guwahati. The petitioner Pradip got a job in N.F. Railway and accordingly he brought his mother Smti Parbati to stay with him at the Railway Quarter at Maligaon and since then they were residing there. The petitioner Padmini Choudhury, another daughter of Late Kuki Bala, the sister of the O.P. had left the maternal house and married one Sri Dhiren Ch. Choudhury without the knowledge of late Kuki Bala and other family members. She had no time to come and hardly came to visit her mother. Late Kuki Bala was suffering from paralysis during the year 2001 and Padumani had never paid any heed to her mother, rather she sought monetary help from her brother Rabilal. Accordingly, O.P. Rabilal was always serving a helping hand to the poverty ridden family and they were constantly attending their old and ailing mother till her death on 23.09.03.

At no point of time, neither Parbati nor Padumani had offered any help to said Kuki Bala and as such question of executing of any Will in favour of said Parbati and Padmini does not arise.

4) Moreover, she was neither the sole owner of the property in question and after partition at present late Kuki Bala was having exclusive right, title and interest only a part of land measuring 5 ½ lechas under Dag No. 741/2138(new) of K.P.Patta No. 1197.

5) So, situated thus, they prayed for dismissal of the Probate Application so filed by the petitioner on distorted and fraudulent facts.

6) Since the Probate Application has become a contentious subject, as such, the application for Probate has partaken the character of suit within the meaning of Section 295 of Succession Act.

7) Now from having perused the pleadings of the parties, the following issues have been framed :-

1. Whether the suit is maintainable ?
2. Whether the testatrix Kuki Bala Das executed any Will in favour of her two daughters namely Parbati Medhi and Padmini Choudhury ?
3. Whether the Will was duly executed ?
4. Whether the Will was fraudulent, collusive manufactured and doubtful?
5. Whether the petitioner/plaintiff are entitled to get the reliefs as prayed for ?

8) In support of their respective cases, plaintiffs/petitioners have examined the petitioner Padmini Choudhury. Her husband Dhiren Choudhury and Aminur Rahman, the official from Sub-Registrar Office, Kamrup. Whereas OP/defendant has examined the OP Rabilal Das, his brother Umesh Das and one Shyam Dey as DW 1, DW 2 and DW 3 respectively.

9) Both the parties have submitted documents in support of their respective cases.

10) I have carefully perused the pleadings of the parties, evidence thereon both oral and documentary. I have also heard argument advanced by the learned counsel for both the sides. Accordingly, I proceed to dispose of the case on the aforesaid issues.

11. **Discussion, Decision and Reasons for such Decision :-**

Let me take up the Issue No. 2 to 4 for my discussion and decision since all these issues are inter-related and same can be decided from the common piece of evidence.

Now from having perused the pleadings of the parties, the controversies in between the parties are found in the following way :-

a) Admittedly, let Kuki Bala Das is the mother of the OPs. and the petitioner Padumini Choudhury.

b) Said Kuki Bala Das has got a plot of land in Sahar Guwahati, Part-II. But it is disputed whether she has exclusive owner and possessor of plot of land measuring 1 Katha 4 Lechas of land covered by Dag No. 741 and K.P. Patta No. 613 or she is the exclusive owner and possessor of a plot of land measuring 5½ Lechas within the aforesaid dag and patta which she has received as her share on partition along with one Lakshi Kanta Das.

c) There is an Assam type house consisting of two rooms over a plot of land measuring 5 ½ Lechas.

d) Admittedly, executant Parbati @ Putul was married to one Surendra Kanta Medhi who was the employee of N.F. Railway.

e) Though the petitioner claimed that said Parbati was driven out by her husband along with her minor children for which she had to take shelter with her mother Kuki Bala but the fact is disputed that said Parbati was staying at North Guwahati, the residence of her husband and her son Pradip (Petitioner No. 3) got a job in N.F. Railway. Accordingly, Parbati was taken to the Quarter of her son Pradip and she died there.

f) Moreover, she has got one more child namely Nimu Medhi. But he was not made a party in the case. Nothing is there to show as to what happened to said

Nimu Medhi.

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g) Though the petitioner claimed that the testatrix died on 23.09.2000. But it is strongly disputed by the OPs that their mother died on 23.09.03. The petitioner has not disputed the date of birth so claimed by the OPs. Admittedly, no death certificate has been brought on record or proved by the petitioner that the testatrix died on 23.09.2000 as they claimed in their application for Probate.

h) The petitioner Padumi as PW 1 has stated in Para 7 of her evidence-on-affidavit that Late Kuki Bala Das, out of love and affection on her own desire made and executed her last Will in respect of the property of schedule of the petition only in her favour.

i) But the alleged Will (Ext-1) upon perusal goes to show that the Testatrix had appointed and constitute Parbati @ Putul Medhi and Smti Padumi Choudhury joint executor of her Will and they shall soon after her death collect the asset and give effect to the provision of last and only Will and thereby bequeathed all her immovable properties consisting of 1 Katha 4 Lechas of land covered by Dag No. 741 of K.P. Patta No. 613 of Sahar Guwahati, Part-II of Mouza Guwahati.

j) It is admitted by petitioner Padmini Choudhury as PW 1 that she was married to Dhiren Choudhury during life time of her father which is about 29 years ago. She has been staying at Takowbari, then Fatasil Ambari which is around 6/7 miles away from her house of her mother Kuki Bala. She admitted that her elder sister Parbati was married to Surendra Kanta Medhi about 30/40 years ago and since his death, her sons got the employment in Railway and Parbati Medhi started living with her son Pradip Medhi at Maligaon. Said Parbati died there at the house of her son.

She further admitted that she has not witnessed to the execution of the same but it was registered on the same day when it was executed.

However, she does not know the English and one Bijon Das and Suren Pathak were the witnesses of the Will. But both of them died now. She along with her husband had been to the Registry Office for execution and registration of the Will.

She admitted that the signature of Kuki Bala appeared in page No. 3 of the Will is found not tallied with her other signatures and moreover the ink used for signing the signature of Kuki Bala and witness Suren Pathak are

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of same in nature. Said Kuki Bala does not know how to read and write English.

She further admitted that the old patta over which the land stands has been converted into a new patta during the lifetime of the Testatrix. But the Will is silent about the fact of said conversion of patta. She further admitted that there was an Assam type house over the land in question. But the Will is silent about the fact of having existed any house, not to speak of Assam type house.

k) PW 2 Dhiren Chandra Choudhury who claims to have eye witness to the execution of the Will, but he was not an attesting witness in the execution of the Will in question. However, he stated that he has given the Will in original to his Advocate, but does not know the same is available or not with the case record. Testatrix Kuki Bala is his mother-in-law. He is not aware as to whether Kuki Bala has got only 5 ½ Lechas of land in the said patta and dag and on being partitioned with the co-sharer Late Lakshi Kanta Das. He admitted that Testatrix died in the year 2003. Whereas, the petitioner claimed that Kuki Bala died on 23.09.2000. He has stated nothing that his wife was taking care of his mother-in-law. He also does not know if the land measuring 5 ½ Lechas was devolved upon the OPs., after the death of Kuki Bala and accordingly they mutated their names in the Revenue Records of right.

l) He further admitted that the OP Dipak Das has been living with the Testatrix in the Assam type house till the death of the Testatrix. One Advocate Hareswar Das drafted and typed out the Will, but no signature is found available over the Will either as scribe or as witness or Advocate.

m) On the other hand, the OPs as defendants have submitted the documents such as copy of Jamabandi of surveyed village in respect of patta No. 613 and Dag No. 741 as Ext-A(1) which goes to show that one Lakshi Kanta Das and Kuki Bala were the original pattadar and after the death of Lakshi Kanta Das, the name of Sewali Das as his wife and his son Bhaben Das, Naba Kumar Das, Jogeswar Das and Lokeswar Das were mutated as his legal heirs in respect of the land measuring 2.41 Are. The total land was there in the patta 3.18 Are.

m) Further, Ext-B is the periodic kheraj patta, issued in the name of

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Lakshi Kanta Das and Kuki Bala Das for land measuring 3.18 Are covered by patta No. 613 and Dag No. 741 which is a Basti land.

It is the further case of the defendants/OPs that by an order dated 08.03.05,

the names of Rabilal, Umesh Das and Tarak Das were mutated in respect of the land as left by their mother Kuki Bala covered by Dag No. 741 of Patta No. 613 of Sahar Guwahati, Part-II of Guwahati Mouza on the premises that the other two legal heirs namely Parbati and Padmini being the married daughter have given their no objection in mutating the names in favour of their brothers as stated aforesaid. Ext-E(2) is the certified copy of Jamabandi wherein it appears that a separate patta bearing No. 1197 was issued in the name of Rabilal, Umesh and Dipak by order dated 19.07.08 and a separate patta was issued vide Ext-E(3) in favour of aforesaid three brothers. Accordingly, they have been paying the land revenue to the Govt. for the aforesaid land and moreover, they have submitted the death certificate of said Kuki Bala Das who died on 23.09.03. The certificate of death has been proved as Ext-I.

12) So, all these existing materials on record palpably go to show that the OPs particularly Dipak Das has been staying with his mother at the suit house till her death. The two daughters/petitioners are found to have staying away from their mother in their respective in-laws house. One of the executant namely Parbati died at the house of her son who was working as an employee in N.F. Railway. The plea raised by the petitioners that Parbati was driven out by her husband and started staying with her mother Kuki Bala is not found proved. The alleged Will is executed on 23.09.94. The petitioners claimed that one Bijon Das and Suren Pathak were the witnesses to the execution of the Will but they are not examined before the Court to prove the due execution of the Will.

13) As such, the petitioners have failed to prove the execution of the Will by not introducing the attesting witnesses as mandated by section 67 of the Indian Evidence Act.

Moreover, the signature of Kuki Bala is found doubtful and the ink used to sign as Kuki Bala and Suren Pathak are in the same nature.

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14) It is settled that in the case of Kalyan Singh Vs. Smti Chhothi and Ors. Reported in AIR 1990 SC 396 - "*The will in the present case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a serious doubt on genuineness of the will. The will has not been produced*

for very many years before the court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty.

A will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party."

So, having considered all the discrepancies, I am of the view that the evidence adduced by the petitioner in support of their case is found shaky, unpeachable and doubtful in nature. On the other hand, the evidence of the Ops/defendants are found supportive both on point of law as well as on facts.

Accordingly, I am of the opinion that the will was not duly executed and the same is found fraudulent, collusive, manufactured and doubtful.

16) Accordingly, these issues are decided against the petitioners/plaintiffs.

17) Now let me take up the Issue No. 1 i.e. whether the suit is maintainable or not.

a) It is an admitted fact that the Probate Misc Case was filed on 08.06.10 for seeking a Probate of a will alleged to have been executed on 23.09.94. Admittedly, the Testatrix died on 23.09.03. The evidence as it appears which has already been discussed in earlier issues that the petitioner Padmini

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claimed to have been present at the time of execution and registration of the will which is executed and registered as back as on 23.09.94. Her mother died in the year 2003 (though she stated that Testatrix died on 23.09.2000). Ext-D is a testimony to the fact that the land left by Kuki Bala was mutated in the name of the OPs, her brothers on the ground that both the petitioners Padumini and her sister

have given no objection. Said Parbati died in the year 2010.

So, there is no any explanation from the side of the petitioners as to why she is keeping mum during all these time since 2003 (2000 ?) to 2010 for enforcing her right to get the Probate in respect of the will .

b) No condonation petition was also filed u/s 5 of the Limitation Act to condone the delay in filing the petition u/s 276 of the Succession Act.

In the case of Kamakhya Prasad Gupta and another Vs. Jibanlal Gupta, reported in (2011) 1 GLT 435, the Hon'ble High Court after having considered different judgments of the Hon'ble High Court and Apex Court has come to a conclusion that the prescribed period of limitation for filing an application seeking Probate is three years. The observation of the Hon'ble High Court in para 51 and 52 is found worthy of reference.

"51. While considering the above submission, it needs to be borne in mind that an application for probate or letter of administration, when made, gives rise to a proceeding and it is at that stage that the applicant has to satisfy the court that the application for probate or letter of administration, as the case may be, has been made within the prescribed period of limitation and, if not, sufficient cause for not applying within time exists and, for this purpose, when an application for probate or letter of administration is time-barred, it has got to be supported by an application made u/s 5 of the Limitation Act. A proceeding for probate or letter of administration commences when the application seeking probate or letter of administration, as the case may be, is made. This proceeding becomes treatable as a 'suit' only after the proceeding becomes a contentious proceeding within the meaning of Section 295 of the Indian Succession Act. There is no scope for a person to apply for probate or letter of administration beyond the prescribed period of limitation unless an application u/s 5 of the Limitation Act, 1963 is made and allowed. If the application, made u/s 5 of the Limitation Act is allowed, it is then and then only that it would, in the event, of resistance, take the shape of a suit in terms of Section 295 of the Indian Succession Act.

52. When the application for seeking probate, made in the present case, was beyond the prescribed period of 3 years, the application was barred by limitation and ought not to have been entertained without condoning the delay as may be done, in a given case, u/s 5 of the Limitation Act."

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Having considered all these and considering the ratio of law as propounded by the Hon'ble High Court as well as the Hon'ble Apex Court, I am of the opinion that the application so filed by the petitioner seeking Probate was found filed beyond the prescribed period of limitation and as such, the same is hit by law of Limitation and accordingly, the suit is found not maintainable.

ORDER

In the result, the suit is dismissed on contest.

However, considering the facts and circumstances of the case, I leave the parties to bear their own cost.

Given under my hand and seal of this Court today the 16th day of March, 2017.

(Smti. P. R. Rajmedhi)
Addl. District Judge No. IV, FTC,
Kamrup (M), Guwahati.