

(1990) 12 GAU CK 0020
In the Gauhati High Court
Case No : First Appeal No. 96 of 1984

Anita Acharyya

APPELLANT

Vs

Ram Chandra Acharyya

RESPONDENT

Date of Decision : 11-12-1990

Acts Referred:

Succession Act, 1925 — Section 276(2), 276(2)

Citation : (1991) 1 GLJ 19 : (1991) 1 GLR 250

Hon'ble Judges : B.P.Saraf, J

Bench : Single Bench

Advocate : M.Das, B.K.Goswami, A.Roy, Advocates appearing for Parties

Judgement

This appeal is directed against the judgment of the District Judge, Sonitpur & Darrang at Tezpur in Title Suit (Probate) No. 7 of 1931 by which the application of the appellant for probate was rejected.

The facts of the case, briefly stated, are as follows; The appellant, Smti. Anita Acharyya, filed a petition for probate under section 276 of the Indian Succession Act, 1925, hereinafter "the Act", before the District Judge, Tezpur. The will of her husband, late Major Bhikeri Charan Acharyya, was also attached to the application. Her case was that her husband, late Major Bhikeri Charan Acharyya was serving in the Army. He was posted at Tezpur on 12.1.77 and since then he had been residing at Tezpur with the petitioner. In March, 1978 he was transferred to Abjhar on Punjab Border. He left Tezpur on March 26/27, 1978 to join at the new place of posting. He joined at Abohar on March 30, 1978. On March 31st, 1978 he got ill and died there on April 1, 1978. He left behind certain movable properties. Certain amounts were also due on account of insurance policy on the life of the deceased, deposit linked insurance scheme, family pension including children allowance and death cum retirement gratuity, Signal Officer's Welfare Fund etc. An application was filed for probate in respect of all these properties by the appellant, the wife of the deceased on the strength of a will dated 24. 2. 68 left by the deceased Major Acharyya. The application for

probate was objected to by the opposite parties on the ground that the appellant was not married to Major Acharyya that the will in question was not the last will; and that the District Judge at Tezpur had no territorial jurisdiction to entertain the application.

The learned District Judge framed six issues. So far as the will is concerned, it was held that the will dated 21. 2. 6 i was the last will and testament of Major Acharyya. However, in regard to the jurisdiction of the Court the learned District Judge held that Tezpur was not the fixed place of abode of Late Major Acharyya in view of the fact that he was transferred to Abohar four days" before his death where he joined two days" before his death. The learned District Judge observed that there was no material on record to show that late Major Acharyya had any intention to settle at Tezpur after his retirement. It was also observed that he had neither purchased any plot of land nor there was any agreement for purchase of a plot of land or a house at Tezpur. In that view of the matter he held that there being no evidence to show that Late Major Acharyya intended to settle at Tezpur after his retirement, Tezpur cannot be held to be his fixed place of abode and, therefore, the Court at Tezpur had no jurisdiction to entertain the application for probate. It was also observed that properties situated in other districts should have been described in the application for probate and valuation should have been given. As that was not done the petition for probate was also not maintainable on that account. In view of these two findings the application for probate was rejected though on merits, the findings were in favour of the appellantpetitioner. This judgment is subject matter of challenge in the instant appeal. A crossobjection has also been filed by the opposite parties.

I have heard the learned counsel for the appellant, Mr. B. K. Goswami, and the learned counsel for the respondent, Mr. A. Roy. One of the main points fiat arises for consideration relates to the jurisdiction of the District Judge at Tezpur to entertain the application for probate filed by the appellant. To determine that issue it will have to be decided whether the testator at the time of the death had a fixed place of adode or had some property situated within the jurisdiction of the District Judge, Sonitpur at Tezpur. There is no dispute about the fact that the testator was posted at Tezpur on12. 1. 77 and was staying there since then till four days before his death when he left Tezpur on 26/27th March, 1978 to join his new place of posting at Abohar in Punjab. He reached that place on 30th March and joined duty on 31st March and died on 1st April, 1978. On these facts it has to be decided whether Tezpur which was his fixed place of abode continued to be so even after he left Tizpar on 25/27th March to join the new place of posting. The next question that may have to be decided is whether the testator had some property situated at Tezpur. If either of these two things is present, the District Judge at Tezpur will have jurisdiction in the matter. The expression "fixed place of abode" has not been defined in the Act. We are, therefore, to ascertain the meaning of this expression. The word "abode" has been defined in Black's Dictionary (5th Edn.) as follows :

"One's home; habitation; place of dwelling; or residence. Ordinarily means "domicile". Living place of impermanent in character...The place where a person dwells...Fixed place of residence for the time being..." According to Stroud's Judicial Dictionary (Fifth Edition), ".place of abode" means the place of residence. A man's residence, where he lives with his family and sleeps at night is always his place of abode in the full sense of the expression. In the Law Lexicon by Justice T. P. Mukherjee, the word "abode" has been defined as follows :

""Habitation or place of residence; stay or continuance. In law it is used in different senses, to denote the place in man's residence, or business temporary or permanent. For some purposes in law a man may be deemed to have an "abode" where he has a place of business, even although he resides elsewhere, or where he has a temporary residence, although his permanent residence is elsewhere or even abroad. But "abode" or residence is quite distinct from domicile, which means much more than even a place of permanent residence; whereas it would seem that "abode" does not even necessarily imply that. Abode "seems larger and looser in its import than the word residence", which in strictness means the place where a man lives. A man's residence, where he lives with his family and sleeps at night, is always his place of abode in full sense of that expression; (R. V. Hammond, (1852) 17 Q. B. 781, per Lord Campbell, C. J.) Whartons Law Lexicon".

In Smt. Raj Rani vs. Raizada Mool Raj, AIR 1962 Punjab 62 the expression "permanent place of abode" was defined to be one where a man has actually been living permanently and not merely as a temporary visitor or a temporary lodger. The contention that the permanent place of abode means the place to which ancestors of a person belonged or a place where his ancestral property is situate, was repelled. In Bhagat Singh Bugga vs. Dewan Jagbir Sawhney, AIR 1941 Calcutta 670, interpreting the word "residence" it was observed :

"Residence is not identical with ownership, it means where a person eats, drinks and sleeps, or where his family or his servants eat, drink and sleep. Mere animus revertendi and a lively interest in a former residence and connection with kith and kin residing there and an interest in ancestral property does not give Court jurisdiction under S.20 of the Code?.

In Govind vs. Anant, AIR 1923 Nagpur 145 referring to the expression "fixed place of abode" it was observed :

? "Fixed" cannot possibly mean "permanent" because no one in this world can be said to have a permanent place of abode, everybody is liable to be transfereed from his place of abode or to transfer himself to another place of residence"

Keeping in view the aforesaid definitions and decisions, it is evident that "fixed place of abode" use! in section 276 (2) (a) does not mean permanent residence. "Fixed" is used in contradistinction to "temporary". Everybody has a particular place as his fixed place of abode at a particular time. That place may, however, be changed. In that case the new place will become his fixed place of abode and

old one will cease to be so. In the instant case it is evident that the testator's fixed place of abode was Tezpur where he was staying since 12.1.77 till four days" before his death. He left Tezpur on March 26/27,1978, joined his new place of posting at Abohar on March 31,1978 and died the very next day on April 1, 1978. It cannot be said that the moment he reached Abohar, his fixed place of abode, which was Tezpur, ceased to be so. It might have been changed in due course. The learned District Judge observed that there was nothing to show that the testator intended to settle permanently at Tezpur or that he had purchased land or had agreement for purchase of land at Tezpur. In my opinion, it was not the correct approach. The decision to settle down permanently or to purchase land is not necessary to hold a particular place as a fixed place of abode of a person. A fixed place of abode cannot be equated with permanent residence. These two expressions connote two different ideas. The correct approach for the Court was to ascertain whether there was any material on record to show that the testator had done something from which a change of his fixed place of abode which was Tezpur can be inferred. In the absence of any such material on record, Tezpur continued to be his fixed place of abode. In that view of the matter, I am of the opinion that the learned District Judge, Tezpur had jurisdiction to entertain the application for probate and to decide the same.

So far as the next finding of the learned District Judge in regard to maintainability of the application is concerned, I find that all the properties given in the schedule to the application are properties situated within the jurisdiction of the District Judge, Tezpur. The appellant had mentioned in the application for probate that she was not aware of any immovable Properties situated in any other place outside the district of Sonitpur. In that view of the matter, she could not have been expected to give any further particulars. Even at the time of hearing of the application, there was no material before the District Judge to show that there was no property anywhere outside the district which should have been disclosed in the petition. In that view of the matter, the finding of the learned District Judge on that count is not tenable. In view of the aforesaid findings, I am of the opinion that the learned District Judge was not justified in dismissing the application for probate. As the findings on other issues are in favour of the appellant, the application should have been allowed and probate should have been granted. I hold accordingly.

The District Judge is directed to issue probate on payment of requisite Court fee etc. in accordance with law.

This appeal is allowed. No order as to costs.