

(2009) 04 OHC CK 0029

In the Orissa High Court

Case No : Second Appeal No. 224 of 1993

Aparna Sahu and Others

APPELLANT

Vs

Raghunath Biswal and Others

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Succession Act, 1956 — Section 30
Succession Act, 1925 — Section 30, 57, 63

Citation : (2009) 2 ILR (Ori) 92(1) : (2009) 2 OLR 809 Supp

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—The Defendants in Title Suit No. 15 of 1996 of the court of the then Additional Munsif, Athamalik, in this appeal filed u/s 100 of the Code of Civil Procedure, seek to assail the judgment and decree dated 18.8.1993 and 27.8.1993 respectively passed by the then Subordinate Judge, Angul in Title Appeal No. 2 of 1990, by which the said court partially modified the judgment and decree passed by the Addl. Munsif, Athamalik in Title Suit No. 15 of 1996.

2. By order dated 31.10.1994, this Second Appeal was admitted to examine the following question of law:

Whether the Courts below erred in accepting Ext. 1, the will executed by Jahar Biswal in favour of Raghunath in respect of specific item of the joint family property?

3. The facts of the case have been elaborately dealt with in both the judgments and as such, this Court refrains from reiterating the same, but then refers to only those facts, which would be very much essential for appreciating the inter se dispute.

4. Respondent No. 1 as the sole Plaintiff had filed the suit, inter alia, praying for

a declaration of right, title and interest and confirmation of possession in respect of the properties morefully described in the suit schedule. Admittedly, Bisi Biswal was the common ancestor of the contesting parties. He had three sons, being Suramani, Ramachandra, and Jahar. Raghunath, the Plaintiff, is the son of Ramachandra. During the life time of Bisi, the ancestral properties were partitioned between the three sons and one share was kept by Bisi for his maintenance. After the death of Bisi in the year 1974, the said share was also partitioned between the three brothers. Jahar one of the sons filed a petition for mutation of the lands, which fell to his share and for separate recording. The same being objected to, Jahar had filed Title Suit No. 8 of 1984 in the court of Additional Munsif, Athamalik. The suit was decreed declaring 1/3rd share in favour of Jahar. Jahar was issueless. As such, Raghunath, the Plaintiff, being his brother's son, was staying with Jahar and was cultivating the lands and also was looking after Jahar. While the matter stood thus, on 26.4.1985, Jahar executed a registered will in respect of his exclusive share of properties described in Schedule "A" of the plaint in favour of the Plaintiff. In consonance with the said will, Plaintiff put forth his claim over Schedule "A" properties after the death of Jahar as exclusive owners. Defendants 1 to 3 interfered with the possession of the Plaintiff in the year 1986 and also disputed his title, consequently, the suit was filed.

5. In the written statement, Defendants took the plea that there was no amicable partition of the ancestral properties. The final decree proceeding in the earlier suit abated as Jahar died during pendency of the said proceeding. The execution of will by Jahar in favour of the Plaintiff was denied and it is averred that after the death of Jahar, all the Defendants have a share in the property.

The trial court on the basis of the pleadings, framed as many as five issues. In order to substantiate their case, the Plaintiff got examined three witnesses and exhibited the registered will executed in his favour by Jahar as Ext. 1. On behalf of the Defendants, only one witness was examined and no document was exhibited.

6. The trial court after vivid discussion of the evidence both oral and documentary, came to the conclusion that there was an earlier partition of the ancestral properties between Bisi and his sons and that after the death of Bisi, the properties which were allotted to his share was also partitioned amongst the three brothers. The trial court also referred to the judgment passed in Title Suit No. 8 of 1994 and held that Jahar was the absolute owner of 1/3rd share of properties, which were allotted to his share. The trial court further held that Jahar had executed and registered a will in favour of the Plaintiff and the said will was a valid one and on the strength of the will, the Plaintiff acquired right, title and interest. The Plaintiff 's possession was also confirmed and the suit was decreed.

7. Being aggrieved by the said judgment the three Defendants filed Title Appeal No. 2 of 1990 in the court of the then Subordinate Judge, Angul. The appellate

court also discussed the evidence both oral and documentary threadbare, and came to the conclusion that the will executed and registered by Jahar was genuine. It was further observed that in consonance with the preliminary decree passed in Title Suit No. 8 of 1994, the Jahar's 1/3rd right over the ancestral properties was declared, but then as the final decree proceeding abated, the Plaintiff cannot claim any specific portion of the property by virtue of the will. Consequently, the appellate court while upholding the decree passed by the trial court with regard to the validity of the will and the right, title and interest conferred upon the Plaintiff by virtue of the said will held that the trial court went wrong in confirming the possession of the Plaintiff over the suit land, which would be otherwise ineffective for execution in absence of specification. According to the appellate court, the Plaintiff was only entitled to the relief of declaration of his 1/3rd share in the suit khata as legatee of Late Jahar Biswal. The said judgment and decree is assailed by the Defendants have in this Second Appeal.

8. Mr. Mukherjee, learned Counsel for the Appellant assails the judgment mainly on the ground that the will said to have been executed by Jahar in favour of the Plaintiff was invalid as attestation of the will had not been proved in accordance with law as no witnesses had said that the testator had seen the attesting witnesses putting their signature and the attesting witnesses had also not said that the testators signed in their presence, thus the mandatory requirement of Section 30 of the Indian Succession Act were not satisfied.

9. Heard Mr. Mukherjee and Mr. Ghosh, learned Counsel for the parties, perused the records meticulously.

10. Admittedly the parties reside at Angul, which is an ex-State and as such, probate is not necessary. Section 57 of the Indian Succession Act, 1925, hereinafter to be called as "the Act", in short, deals with application of certain provisions of the Act and stipulates that the provisions of Part-VI set out in Schedule-III shall be applicable subject to the restrictions and modification specified in the said Section. Sub-sections (a) and (b) of Section 57 reads as follows:

57. Application of certain provisions of Part to a class of Wills, made by Hindus, etc.- The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply -

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to Immovable property situate within those territories or limits; and

11. In the decision reported in *Amrutlal Majhi and Ors. v. Japi Sahuani and Ors.* 1972 (II) CWR 1451, this Court had the occasion to deal with similar question and held that probate is not necessary so far as a will executed in Ex-State. The said case deals with a will executed in Bolangir District.

12. Admittedly, Ext. 1 is a will executed by Jahar Biswal in favour of Raghunath and the same was duly registered before the Sub-Registrar. By the said will specific item of the joint family properties had been bequeathed. The question is as to whether specific property of the joint family can be bequeathed by a co-sharer. Law is well settled that till the properties are partitioned by metes and bounds, every co-sharer has a right over each inch of the coparcenary property, Section 30 of the Hindu Succession Act deals with testamentary succession, which reads as follows:

30. Testamentary succession.- Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act 1925 (39 of 1925) or any other law for the time being in force and applicable to Hindus.

A reading of the said provision clearly reveals that a Hindu has a right to dispose of the property, which is capable of being so disposed of by him. The words "capable of being so disposed of means and connotes that only those properties over which he had exclusive right, title and interest can only be disposed of by a will and not other properties. In the case in hand, the parties being governed by mitakashara Hindu Law, unless there is material to show that in fact the joint family coparcener properties had been partitioned by metes and bounds and specific properties have been allotted to Jahar, the Plaintiff cannot acquire right, title and interest over the specific properties, which were disposed of by the will in his favour by Jahar. The appellate court has rightly appreciated the facts and position of law and has come to the conclusion that by virtue of the will executed by Jahar, the properties, which would be allotted to his share in partition only can be claimed by the Plaintiff. Fact remains, no appeal has been filed against the said finding by the Plaintiff and as such, the finding of the appellate court has attained finality. Thus, the substantial question framed stands answered.

13. The only other submission of Mr. Mukherjee is with regard to the validity of the will. It is submitted, rather forcefully, that the will having not been attested as per law, the same should be declared as invalid. Consequently, the Plaintiff, it should be held, had acquired no title over the properties covered under the will. Section 63 of the Indian Succession Act, 1925 deals with execution of wills. The dispute in the present case is with regard to defect in attestation. Sub-section (c) of Section 63 of the Act reads as follows:

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) xx xx xx (b) xx xx xx

(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 been 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.

In consonance with the said Section, a will must be signed by two attesting witnesses in the presence of the testator. The intention of the legislature evidently is that the testator must have ocular evidence of the identity of the instrument subscribed by the witness. To fulfill such requirement, it is often observed that the signatures may be made in the presence of the testator. To constitute "presence", it is essential that the testator must be mentally capable of recognizing the act, which is being performed before him and will not amount to only corporal presence. The requirement of law is that a testator must be conscious of the transaction in which the witnesses are engaged. So, when a will is attested without the knowledge of the testator the fact that he was in the room, would not matter. At the same time it is not requisite that the testator should actually see the witness sign, but it is sufficient if he might have seen them, had he so desired. In the case of *Casson v. Dude*, 1 Bro. C.C. 99, the testatrix executed the will in her carriage outside her attorney's office. The witnesses attested the will in the attorney's office in a place which is visible from the carriage. In the said case, Lord Thurlow held that the will was well executed because the testatrix might have seen what passed through the window of the office. But then where a will is attested in an adjoining hall, which is not visible from the place where the testator is, it is not duly attested. To conclude, it would suffice to say that the rule requires that the witnesses should be actually within the reach of the organs of sight of the testator. Thus, testator must be conscious of the presence of the attesting witnesses and the place where the attesting witness put their signature should be within his/her sight.

14. In the case in hand, P.W.3 is the attesting witnesses. In his deposition, he has stated as follows:

X x x x I know Jahar Biswal. Jahar Biswal one day called me and Maheswar Naik to become witness of a will which he wanted to execution (sick) in favour of Raghunath Biswal. So I came to Athamallik. We went to deed writer Bichitrananda. As per the version of Jahar Biswal, the deed writer scribed the will and it was readover to us and then Jahar Biswal affixed thumb impression and I and Maheswar gave our signature."

Nothing could be elucidated from the said witness with regard to the veracity of

the statement. Thus, this Court finds that the will was validly attested.

15. Only on other ground which needs to be dealt with is with regard to the submission of Mr. Mukherjee that P.W.3 did not identify the testator before the Sub-Registrar. This submission also appears to be factually not correct. P.W.3 in his examination-in-chief has stated:

Ext. 1 is the said will. This is my signature in the in the front page of the will marked Ext. 1/f. This is signature on the last page of the will marked Ext. 1/g. Then the deed of will was presented. Sub-Registration Officer. I was present before the Registration Officer at the time of registration. I also give my signature.

Mr. Mukharjee, relied upon the following statement made by the said witness in cross-examination, in support of his argument that P.W. 3 had not identified the will.

Before the Registration Officer, I did not identify Jahar Biswal to the Registration Officer. X x x

The words "to the Registration Officer" are very significant. The deed itself reveals that P.W.3 has signed as identifier. He also admitted about such fact. He was present in the Sub-Registration Office in course of registration. The question of identifying Jahar personally to the Sub Registrar does not arise. A cumulative reading of the entire evidence clearly establishes the fact that not only there was valid attestation but also there was no defect in the registration of the will executed by Jahar in favour of the Plaintiff. That apart, all these are questions of fact, which have been dealt with by the courts below in extenso.

After going through the judgments and in view of the discussions made above, this Court is satisfied that the learned lower appellate court has not committed any error apparent on the face of the record. The conclusion arrived at by the appellate court that the will was a valid one and that in consonance with the aforesaid will the Plaintiff had acquired right, title and interest only in respect of 1/3rd properties of Jahar and not specific properties mentioned in the will is just and proper, and the said findings need no interference. The Second Appeal is accordingly dismissed. Parties to bear their own cost.