

(2014) 01 MP CK 0008

In the Madhya Pradesh High Court

Case No : Writ Petition No"s. 16527 of 2012 and 2255 of 2013

Dr. Neena V. Patel

APPELLANT

Vs

Smt. Jyotsnaben P. Patel and Others

RESPONDENT

Date of Decision : 15-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 15, Order 18 Rule 4, Order 7 Rule 14

Constitution of India, 1950 — Article 227

Citation : (2014) 01 MP CK 0008

Hon'ble Judges : K.K. Trivedi, J

Bench : Single Bench

Advocate : Pravin Samdani, assisted by Mr. Kunal Vajani, Mr. Pranaya Goel, Mr. Karl Tamboly and Mr. Priyankush Jain, for the Appellant; Satish Agrawal, learned Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

K.K. Trivedi, J.—Both the writ petitions are heard together and are being disposed of by this common order. However, for the purposes of this order, facts are taken from W.P. No. 2255/2013. These writ petitions under Article 227 of the Constitution of India are directed against the order dated 19.10.2012 passed in Probate Case No. 7/2008 by the IV Additional District Judge, Jabalpur. The petitioner herein is non-applicant in the aforesaid Probate Case and respondent No. 1 herein is the applicant seeking probate of a Will of late Parmanand Bhai Patel. The facts giving rise for filing of the present petition in short are that on an application made by the respondent No. 1, seeking probate of a Will dated 23.12.1991, the proceedings were initiated. Certain objections were filed by the petitioner and other respondents and the matter was taken up for hearing. The main contest was with respect to the effect of the Will said to be executed by late Parmanand Bhai Patel way back in the year 1991 and as to the entitlement of receiving the benefits. The matter so proceeded and ultimately for the purpose of recording of evidence, at the relevant time since the respondent No. 1 was not in

a position to travel from Mumbai to Jabalpur, an application was made for appointment of a Commissioner. The Commissioner visited the place of residence of respondent No. 1 and at the time of recording of evidence, certain documents were sought to be produced, which were objected to by the petitioner. The matter was referred to the Court but the said documents were taken on record by the Commissioner.

2. When the matter reached to the Court since the respondent No. 1 was in a position to travel by Air to Jabalpur, it appears that on an application raising objection with respect to taking documents on record, an order was passed by the Trial Court and such an objection raised by the petitioner was rejected. However, said order was not challenged but analogous writ petition was filed raising certain objection with respect to initiating the proceeding for cross-examination of respondent No. 1. When the matter was in seisin before this Court, a prayer was made for adjournment of the proceedings before the Trial Court on the ground that the writ petition was to be heard by this Court and, therefore, proceedings for cross-examination of respondent No. 1 may be adjourned. It is noteworthy to state that the hearing of the writ petition itself was fixed on the date on which the cross-examination of respondent No. 1 was to be conducted in the trial Court. On the prayer made by the Counsel for the petitioner herein, the Trial Court put the matter for hearing post lunch break and thereafter since the hearing of the writ petition could not be concluded, it appears that the said fact was brought to the notice of the Trial Court but the same was not accepted and right to cross-examine the respondent No. 1 available to the petitioner was closed, therefore, such an order is challenged in the present writ petition and this is how both the writ petitions are listed for analogous hearing.

3. It is contended by learned senior Counsel for the petitioner that if the provisions of Order 7 Rule 14 of the CPC are minutely examined, it was necessary on the part of respondent No. 1 to produce the relevant documents at the time of filing of the probate case. Since the procedure as laid-down under the CPC is made applicable for probate proceedings, non-compliance of mandatory provisions will entail rejection of such documents. Further, it was necessary on the part of respondent No. 1 to comply with the provisions of Order 11 Rule 15 of the CPC and the provisions of Order 18 Rule 4 of the CPC with respect to production of documents. Nothing was done, therefore, at the stage of cross-examination before the Commissioner, such documents were not to be produced. If the documents were so produced, without exhibiting the same, the Commissioner was required to receive such documents and refer the same to the Trial Court for deciding whether such documents were to be taken on record or not. However, very fairly it is stated that since after taking the documents on record, the objection raised in that respect has been decided by the Trial Court, it would not be necessary for the Court to decide whether such documents were to be taken on record or not. Now the question is only if this was the situation, while objection was decided and a writ petition was filed before this Court against

such action of the Trial Court, was it not necessary for the Trial Court to wait for a decision on the writ petition and not to close the right of the petitioner to examine the respondent No. 1. It is stated that only this much is required to be seen whether the right of the petitioner was rightly closed or not. Drawing attention of this Court to paragraph 36 of the deposition-sheet of the witness, it is stated that in fact no reasoned order was passed on the order-sheet closing the right of the petitioner to cross-examine the said witness in appropriate manner. However, the reasons are recorded in the deposition-sheet, which is not the proper procedure. The deposition-sheets are not challengeable whereas an order passed even in order-sheet can be called in question. Thus, it is contended that right to cross-examine respondent No. 1 was wrongly closed and the petitioner has been deprived of legitimate and rightful defence. Secondly, it is contended that the proceedings are not yet closed as other witnesses are to be examined by the respondent No. 1/applicant in proof of her claim and in such circumstances if an opportunity is extended to the petitioner to cross-examine the respondent No. 1, no harm would be caused to respondent No. 1.

4. Per contra it is submitted by learned Counsel for respondent No. 1 that it is not now open to the petitioner to say that her right was wrongly closed by the Trial Court to cross-examine the respondent No. 1. In fact right from the date of initiation of proceedings, knowing fully well that the respondent No. 1, applicant in the probate proceeding, is an aged lady, all attempts were made to linger on the proceedings so that ultimately rightful order could not be passed in favour of respondent No. 1. Further it is contended that the order impugned itself assign the reason why the right to cross-examine the witness was closed and why the matter was posted for completion of the cross-examination by other non-applicants. Thus, it is contended that the right of cross-examination cannot be granted to the petitioner and rightful orders have been passed by the Trial Court which need not be interfered by this Court.

5. Heard learned Counsel for the parties at length and perused the record minutely.

6. The impugned order and the order-sheets itself indicate that when the respondent No. 1 appeared for the purposes of cross-examination on 19.10.2012, the fact was brought to the notice of the Trial Court that the order dated 03.09.2012 passed by the Trial Court was challenged in a writ petition before this Court and the matter was listed for hearing on 19.10.2012 itself. Since the hearing of the case was to be done at 2.30 PM by the High Court, prayer was made to postpone the proceedings of the Trial Court till the hearing is concluded. Believing such statement made on oath on behalf of the petitioner, the Trial Court adjourned the hearing of the probate case up to 3.00 PM. Thereafter, the order-sheet indicates that the parties appeared before the Court. The witness-respondent No. 1 was present in the Court, who completed her examination-in-chief. At what time the said order-sheet was written, is not recorded. However, the fact simply recorded was that on behalf of respondent

No. 1 it was said that no cross-examination can be done. Rest of the non-applicants cross-examined the said witness and the matter was postponed thereafter for the next date on their request. Nothing except this is recorded in the order-sheet of 19.10.2012. From the fact which has been stated by the senior Counsel for petitioner, it appears that in the deposition-sheet itself such facts were incorporated and in fact the order itself was passed on the deposition-sheet as is clear from paragraph 36 of the said deposition-sheet, which is reproduced for ready reference:

7. If order passed on deposition-sheet is examined, the same will indicate that reasons were recorded only and only on deposition-sheet and not on the order-sheet. This is not the procedure laid-down under the Civil Court Rules and Orders. If an objection is raised or prayer is made for any reason, the prayer or objection alone is to be recorded in the deposition-sheet and the order is passed only and only on the order-sheets. Both cannot be read together as the deposition-sheet is not an appealable document. This being so, in fact the order itself was incorrectly passed by the Trial Court. Further if there was no occasion to challenge the order passed with respect to taking the document on record and this itself is not seriously placed by learned senior Counsel for the petitioner, at any rate the Court should have waited for an order from this Court when a litigation was brought before this Court and taking into note of such fact, the proceedings were postponed for some time by the Trial Court. If that would have been done, the respondent No. 1 could have been cross-examined on the next day by the petitioner herein as by that time the petitioner was aware of the result of the litigation brought before this Court against the order of the Trial Court. Hastily actions are not to be taken in such a manner.

8. Now since only this much is submitted by learned senior Counsel for the petitioner that if once an opportunity is granted to cross-examine the respondent No. 1, the purpose would be served, this Court deems it necessary to grant such an opportunity to the petitioner. In view of this, partly allowing the writ petition, the order dated 19.10.2012, so far as closer of right of petitioner to cross-examine the respondent No. 1 is concerned, is set aside. The petitioner would be entitled to cross-examine the respondent No. 1 only once. If a convenient date could be fixed for appearance of respondent No. 1 in the probate case for the purposes of cross-examination, such a date be fixed by the Trial Court. In case it is found that the respondent No. 1 is not in a position to travel again to Jabalpur, the petitioner will make an application for cross-examination of respondent No. 1 on Commission and all such expenses of Commission would be borne by the petitioner. No further opportunity to cross-examine the respondent No. 1 would be available to the petitioner in case she fails to avail of this opportunity extended by this Court only once. Let this be done within a period of two months from today. If the Presiding Officer of Court is not posted, the District Judge, Jabalpur will make proper order of hearing of probate case by the Judge available.

9. For the reason that documents are now taken on record by the order of the

Court, no useful purpose would be served by granting any relief in W.P. No. 16527/2012. The writ petitions are accordingly disposed of. Parties to bear their own costs.