

(1989) 12 PAT CK 0001

In the Patna High Court

Case No : Appeal from original decree no. 464 of 1979 (R)

Luisa Tirkey

APPELLANT

Vs

Joseph Ekka

RESPONDENT

Date of Decision : 21-12-1989

Acts Referred:

Evidence Act, 1872 — Section 3, 68

General Clauses Act, 1897 — Section 6

Succession Act, 1925 — Section 10, 100, 101, 102, 103

Citation : (1990) 2 PLJR 649

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : N.N. Tiwari and A.K. Sahani, for the Appellant; S.D. Mishra and J. Kandulna, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—This first appeal arises out of a judgment and decree dated 1.3.1979 passed by Shri Om Prakash, Additional District Judge, VIII Court, Patna arising out of Probate Case No. 71 of 1974; whereby and where under the said learned court granted a probate of will dated 21.12.1973 executed by Mostt. Mariam Runda in favour of one Joseph Ekka. In view of the short point involved in this appeal it is not necessary to state the facts of the case in great details.

2. Suffice it to say that the plaintiff Joseph Ekka filed an application for grant of probate in terms of Section 276 of the Indian Succession Act alleging therein that his mother-in-law Mostt. Mariam Runda daughter of Balua Ora-on resident of Father khunthwa, P.S. Ranchi, District Ranchi had executed a will on 21. (sic) 2.1973 in his favour in respect of her immoveable properties described in Schedule 1 at the foot of the petition, at Gardanibagh, Patna where she ordinarily used to reside and where she died.

3. Allegedly, the aforementioned Mariam Runda died on 27.1.1974.

4. In the aforementioned application, citations having been issued by the District Judge, the defendant-appellant appeared before the said learned court and filed an objection on 19.11.1975 contending therein that she is the daughter of deceased Mariam Runda and had been in possession of the properties in suit by virtue of an oral gift.

It was further contended that the said purported will was a forged and fabricated document.

It was further alleged that Mariam Runda at the time of execution of will was allegedly 80 years old and had no power to understand for transacting any business.

It was further pleaded that Mariam Runda being an oraoon woman, was exempted from the operation of the Indian Succession Act and such probate can not be granted.

5. In view of the aforementioned objection the said Probate Case No. 71 of 1974 was treated to be a title suit and was marked as Title Suit No. 29 of 1977.

In the aforementioned suit a written statement was filed by the defendant-appellant on 24.2.1978 wherein, inter alia, it was alleged that the plaintiff had removed the aforementioned Mariam Runda from Ranchi to Patna when she was seriously ill in January, 1974, in her absence on pretext to get her treated. She was sent back to Ranchi after one week in serious condition an J it is possible that during the aforementioned period the plaintiff might have obtained L.T.I. and signature of Mariam Runda in her unconscious stage.

6. It was further contended that the said purported will is an outcome of undue influence, coercion, fraud and misrepresentation and the same had neither been executed by her nor it was scribed with her content. It was further contended that at the relevant time she was not having a proper mental state to understand the contents of the said will.

7. Upon the aforementioned pleadings of the parties, the learned court below framed the following issues:--

- (1) Whether the suit maintainable in its present form?
- (2) Whether the plaintiff has cause of action?
- (3) Whether the defendant's story of oral gift and possession is true?
- (4) Whether the will dated 21.12.73 in favour of the plaintiff is genuine?
- (5) Whether the plaintiff is entitled to any relief. If so, to what relief?

8. By reason of the impugned judgment the learned court below held that the aforementioned will dated 21.12.1973 executed by Mariam Runda in favour of the plaintiff, which was marked as Ext. 1, was valid.

9. With regard to the maintainability of the application for the grant of probate, the learned court below while deciding the issue No. 1 hold that in view of sub-section (I) of Section 218(1) of the Indian Succession Act, an application for grant of probate is maintainable also in respect of an exempted person.

10. Mr. N.N. Tiwari, learned counsel appearing on behalf of the appellant has raised only one contention in support of the appeal. The learned counsel submitted that in view of the fact that a notification was issued in terms of Section 3 of the aforementioned Act; whereby and where under the members of the Schedule Tribe were exempted from the operation of the said Act, the learned court below has no jurisdiction to grant probate in respect of the aforementioned will.

11. The learned counsel further submitted that in any event, the learned court below has no jurisdiction to consider the disputed question of title.

12. Section 3 of the said Act reads as follows:--

Power of State Government to exempt any race, sect or tribe in the State from operation of Act.-- The State Government may, by notification in the Official Gazette retrospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe in the State or of any part of such race, sect or tribe, to whom the State Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.

(2) The State Government may, by a like notification, revoke any such order, but not so that the revocation shall have retrospective effect.

(3) Persons exempted under this section or exempted from the operation of any of the provisions of the Indian Succession Act, 1865 u/s 332 of that Act are in this Act referred to as "exempted persons."

13. A copy of the notification dated May 3, 1913 bearing No. 550 was issued whereby and where under the Governor General in Council was pleased to exempt all Mundas, Oraons, Santals, Hog. Bhumiji, Kharias. Ghasis, Gonds, Kandhs, Korwas, Kurmis, Male Saurias and Pans, dwelling in the province of Bihar and Orissa from the operation of the provisions of the Act retrospectively from the passing of (the said Act).

14. It is therefore, clear that the parties being Mundas are exempted from the operation of the said Act.

15. There can not, therefore, be any doubt whatsoever that the parties were exempted persons within the meaning of the said Act.

However, in terms of Section 218 of the said Act an order for administration of the properties can be granted even in relation to an exempted person.

16. Section 218 of the said Act reads as follows:--

To whom administration may be granted, where deceased in a Hindu, Muhammadan, Buddhist, Sikh, Jain or exempted person:

(1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

17. As noticed hereinbefore, the learned lower court while considering the maintainability of the application relied upon Section 218 of the said Act.

18. However, the said provision on the face of it is not applicable in this case inasmuch as the said provision applies only in a case where a person has died intestate.

19. Mr. S.D. Mishra, learned counsel appearing on behalf of the respondent, on the other hand, strongly relied upon the Section 218 (1) of the Indian Succession Act and further relied upon the decision of this court in *Tuni Oraon vs. Leda Oraon* reported in 20 Cal 1082 : AIR 1916 Pat 374.

20. The learned counsel further relied upon the decision in *Rammal (Das) Koch Vs. Kakal Koli Kochini*, .

21. He has further relied upon the case of AIR 1938 173 (Nagpur) .

22. The decisions relied upon by Shri Mishra are not applicable to the facts and circumstances of this case. In the case of *Tuni Oraon* (supra) this court was concerned with a notification issued u/s 332 of the Succession Act of 1865 which exempted Oraon from the purview of the provision of the said Act. It was, however, provided therein that the said notification shall not affect any person with regard to whose right a decision contrary to its effect has already been given by a competent Civil Court.

23. *Mullick, J.* in that case held that the decision of the Civil Court in the context of the said notification does not mean some final decision which would operate as *res judicata* but would include a decision under appeal.

24. In the decision of the Calcutta High Court in *Nowrang Singh v. Janardan Kishore Lal Singh Deo* reported in Vol. 22 Calcutta Weekly Notes 315, the question which arises for consideration of this case did not arise therein at all. In that case the court was concerned with interpretation of the provision of Section 30 of the Indian Succession Act, 1865 vis-a-vis Section 68 of the Evidence Act and held that in terms of the said provision the will can be proved in the court of

probate by one of the attesting witnesses.

25. In terms of Section 3 of the said Act, inter alia, a tribe may be exempted from the operation of the said Act and thus all the members of the said tribes are beneficiaries of the said exemption.

26. As noticed hereinbefore, Sub-section (1) of Section 218 of the said Act is in two parts i.e.:--

(a) If the deceased has died intestate and was Hindu, Muhammadan, Buddhist, Sikh or Jain or he was an exempted person :

(b) Administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

27. Whereas grant of administration is a discretionary relief but probate is not.

28. In AIR 1938 173 (Nagpur) , the court merely held that where a court assumed that the deceased was a Muslim or Christian and proceeded u/s 218 or 219 as the case may be, the proceeding is not void.

In that case it was further held that a probate court does not and can not go into the question of title.

29. Section 30 of the said Act provides that a person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

It is not the case of the plaintiff-respondent that the properties in question were not the subject matter of the will or the Mariam Runda died intestate in respect of distribution of the properties.

30. In this view of the matter, in my opinion, as according to the plaintiff-respondent himself, Mariam Runda executed a deed of will in his favour in respect of all immoveable properties belonging to her. Section 218 of the said Act can not be said to have any application.

31. It was further submitted that no notification as contemplated u/s 3 of the Indian Succession Act 1925 had been issued and Ext. C, being the notification dated 3 May, 1913 having been issued under Indian Succession Act 1865 has lost its force.

The contention of the learned counsel can not be accepted inasmuch as despite the repeal of the Indian Succession Act 1865, all actions taken thereunder shall be deemed to have been saved in terms of Section 6 of the General Clauses Act and is also saved in terms of Sec. 391 of the Indian Succession Act, 1925.

32. In this view of the matter, the notification dated 3 May, 1913 shall be deemed to remain operative despite the repeal of Indian Succession Act, 1865.

33. Further it is not and could not be the case of the plaintiff that even under the customary laws of inheritance and succession, he was entitled to succeed to the property of the deceased Mariam Runda.

34. Taking thus, the facts and circumstances of the case, in my opinion, the application filed by the plaintiff-respondent for grant of probate in respect of will allegedly executed by Mariam Runda was not maintainable.

35. In the result, this appeal is allowed and the judgment and decree passed by the learned court below is set aside.

36. However, in the facts and circumstances of this case, there will be no order as to costs. Before parting with the case, it must be observed that in view of the question involved in this appeal, I have not considered the merits of the case of the respective parties with regard to their respective claim of title over the properties in question.