
(2001) 02 OHC CK 0025
In the Orissa High Court
Case No : Misc. Appeal No. 589 of 1999

M. Jagadiswar Rao and others	Vs	APPELLANT
Pratibasini Mohanty and others		RESPONDENT

Date of Decision : 08-02-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)
Succession Act, 1925 — Section 276, 299

Citation : (2001) 2 CivCC 545 : (2001) 91 CLT 710 : (2001) 1 OLR 382 : (2001) 4 RCR(Civil) 652

Hon'ble Judges : Pradipta Ray, J

Bench : Single Bench

Advocate : M/s S.K. Padhi, B.K. Sahoo, S.K. Mohapatra, S. Parida and Miss. D. Mohapatra, for the Appellant; M/s C.A. Rao, S.K. Behera and A. Tripathy, for the Respondent

Final Decision : Allowed

Judgement

Pradipta Ray, J.—The present appeal has been filed against judgment and order dated February 27, 1999 passed by the Civil Judge, Senior Division, Berhampur dismissing the present appellants' application u/s 276 of the Indian Succession Act for grant of probate of a will executed by one Manmohini Mohanty.

2. Present appeal has been presented as a Miscellaneous Appeal. The Stamp Reporter in his report has raised a doubt whether the present appeal can be registered as a Miscellaneous Appeal.

3. It appears to be settled that an order passed in a proceeding for grant of probate is not a decree within the meaning of section 2(2) of the CPC and as such the appeal u/s 299 of the Indian Succession Act against-such order is not an appeal against a decree. A Full Bench of Allahabad High Court in Mrs. Panzy Fernandas Vs. Mrs. M.F. Queoros and Others, held that the decision of a Court in proceedings for letters of administration cannot be described as a decree. Relying upon the said decision this Court in Mst. Puinbasi Majhiani Vs. Shiba Bhue and

Another, has held :-

"In my opinion, even where the probate proceedings become contentious, they, are merely to assume the form of a regular suit though in reality the proceedings are not in the nature of a regular suit under the provisions of the Code of Civil Procedure.

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Thus unless a proceeding starts with a plaint as such it is not a suit and accordingly an order in such a proceeding cannot be a decree within the meaning of the Civil Procedure Code."

Supreme Court in *Diwan Bros. Vs. Central Bank of India, Bombay and Others*, approved the said Full Bench decision of Allahabad High Court and similar decisions of several Other High Courts.

4. A Division Bench of Calcutta High Court in *Balai Lall Banerjee and Others Vs. Debaki Kumar Ganguly and Others*, overruled the opinion of the Stamp Reporter therein that an appeal against a final order in a probate proceeding should be classified as appeal from the original decree and held :--

"Therefore, upon reading the relevant provisions of the Succession Act and the authorities referred to above, we are of the view that a proceeding for grant of Probate or Letters of Administration is, not strictly a suit though in some cases where the grant is opposed it is deemed as such, That, in our view is only for the purpose of classification of the proceeding without changing its character. The order passed in such a proceeding may have the force of a decree but strictly it is not a decree, not having been passed in a suit. Therefore, in our view a formal decree does not, seem to be required to be drawn up following an order of grant. What follows from the order is the grant in the form set out in Sch. VI or VII of the Act.

Consequently the view of the Stamp Reporter that the appeals being against the order for grant of Probate in one case and Letters of Administration in the other should be classified as appeals, from original decrees in terms of R. 10, Chap. IV of the Rules of Business and, as such, required to be accompanied by the certified copies of the decrees or that in the absence of such copy the appeals are incompetent, does not seem to be correct."

Thus the present appeal has been correctly presented as a Miscellaneous Appeal.

5. The present appellants being purchasers from the legatee under the disputed Will filed an application for grant of probate to the Will executed by Manmohini Mobanty, widow of Richard Mohanty in favour of one of her sons Biraja Kumar Mohanty, respondent No. 5 in the Trial Court. According to them, on July 5, 1985 Manmohini executed the said Will bequeathing the house described in the schedule to the petition in favour of her youngest son Biraja. Subsequently Biraja sold one part of the suit house to the petitioners Nos 1 to 3 by a registered deed

of sale dated June 26, 1993 for valuable consideration and on the same date sold the remaining part of the suit house to petitioners 4 to 6. Possession of the house was also delivered to the purchasers. Respondents 3 to 5 vacated the suit house and shifted to other places. Respondents 1 and 2 were, however, permitted to stay in a small portion of the house. Respondent No. 1 Kamal Kumar Mohanty the eldest son of Manmohini filed Title Suit No. 37/91 in the court of Civil Judge. Senior Division, Berhampur against his other brothers and sisters for a share in the house. The petitioners for probate have also filed Title Suit No, 124/95 in the same court for declaration of their right, title and interest. Both the suits are being analogously heard. As a Will executed by a Christian is required to be probated the appellants being purchasers from the legatee filed application for probate.

6. Kamal Kumar Mohanty, the eldest son and Swarnamayee Mohanty, daughter of Manmohini contested the application for grant of probate. Respondent No. 4. Bimal Kumar Mohanty appeared and supported the claim of the appellants. Respondents 3 and 5 did not appear or contest the claim.

7. The case of respondents 1 and 2, inter alia, is :

After death of Richard Mohanty, Manmohini was not the exclusive owner of suit house and she was only one of the co-sharers along with other heirs of Richard Mohanty. At the time of execution of the alleged Will Manmohini was suffering from blood pressure and was not in a sound state of mind. The Will was not executed out of her free volition and Biraja fraudulently obtained signatures of Manmohini on various papers while she was ailing and lost her mental soundness.

8. In support of their case for grant of probate the petitioners exhibited the sale deeds being Exts. 2 and 3 in which Bimal, Bijaya and Swarnamayee were also signatories, and a deed of agreement being Ext. 4, between Biraja, Bimal and Swarnamayee directly referring to the Will of Manmohini dated July 5, 1985. According to the said agreement (Ext. 4) Biraja paid a sum of Rs. 1,50,000/- to his brothers and sister to purchase peace. The execution of the Will by Manmohini was acknowledged in the said agreement. Appellants also examined one attesting witness (p. w. 1) and the scribe (p. w. 2) to prove execution of the Will.

9. The contesting respondents, Kamal and Swarnamayee deposed as witnesses. They did not examine any other independent witness. They also did not exhibit any document.

10. The Trial Court has not considered any of the said documents, i. e. Exts. 2 to 4 The Trial Court rejected the petition upon its analysis of the oral evidence. Trial Court has been mainly influenced by a discrepancy in the evidence of the scribe. The scribe has stated in his evidence that on July 5, 1985, i. e. the date of execution of the Will he saw the record-of-rights in favour of Manmohini although the final order settling the house in favour of Manmohini was passed on July 16, 1985. The Trial Court has also entered into certain surmises and conjectures in

its decision and has entertained a suspicion about the motive of Manmohini. It has failed to notice that three sons of Manmohini have accepted the execution of the Will. Even Swarnamayee signed documents acknowledging execution of such Will, Kamal, respondents No. 1 in his evidence admitted that he was staying at Jamshedpur and Biraja was looking after Manmohini. The suspicion entertained by the Trial Court is without any basis and wholly unwarranted. Trial Court has also failed to notice that the contesting respondents failed to adduce any evidence regarding alleged mental unsoundness of Manmohini. They have only stated that she was suffering from blood pressure. Blood pressure by itself does not make one mentally unsound. It appears that the Trial Court has failed to take into consideration the evidence in its entirety. Piecemeal consideration has vitiated the findings. While analysing oral evidence Trial Court overlooked several vital aspects. Deposition of Swarnamayee (d. w. 2) ex facie shows that she is not at all reliable. She admitted her signature, Ext. 2/A and immediately thereafter denied that it was her signature. She also vacillated when she was confronted with her signatures, Exts. 4/A, 4/B and 4/C. Regarding her signaturers in the two sale deeds and the relinquishment deed and the receipt of money from Biraja her evidence is as follows :

""It is a fact that I had admitted my signatures in the two sale deeds and the relinquishment deed in my previous depositions in T. S. 124/95. It is not a fact that I had deposited the money of Rs. 50,000/- in the B. C. C. Bank within 10 days of 24-6-93. I do not remember if I had deposited any money in my Bank account.

I might have stated in my previous evidence in T. S. 124/95 that I had deposited Rs. 30,000/- to Rs. 40,000/- in my Bank within 10 days of 24-6-93."

In view of her evidence it is very clear that Swarnamayee's objection is not genuine and she accepted execution, of the Will by her mother Kamal had no personal knowledge as he was admittedly residing elsewhere. He admitted that after, death of the father Manmohini was looking after the properties and operating the Bank accounts.

11. Considering all the materials on record and particularly the documents, Exts. 2 to 4 and acceptance of execution of Will by three other sons of Manmohini, it is very clear that the petitioners (appellants herein) have successfully proved execution of the Will by Manmohini. The finding of the Trial Court is contrary to the evidence on record and unacceptable.

12. A probate proceeding is confined to examination of the question of execution of the Will and mental capacity of the testator. The Probate Court is not concerned whether the testator had title to the subject-matter of the Will or with the effect and consequences thereof. Whether Manmohini was the exclusive owner of the entire house or not is a question which will be decided in the pending title suits.

13. For the foregoing reasons the judgment of the Trial Court is set aside. The

application for grant of probate is allowed. The Trial Court is directed to grant formal letter of probate upon completion of required procedural formalities.

14. Appeal allowed.