
(1970) 04 PAT CK 0009
In the Patna High Court
Case No : Civil Revision No. 292 of 1969

Mst. Tribeni Kuer and Another	Vs	APPELLANT
Shankar Tiwari and Others		RESPONDENT

Date of Decision : 18-04-1970

Acts Referred:

Succession Act, 1925 — Section 268

Citation : AIR 1971 Patna 391

Hon'ble Judges : N.L. Untwalia, J;A.N. Mukharji, J

Bench : Division Bench

Advocate : Sankat Haran Singh and Narendra Kumar Ambastha, for the Appellant; Jagdish Pandey, Ramanand Prasad Yadav and Damodar Prasad Tiwari, for the Respondent

Final Decision : Dismissed

Judgement

Mukharji, J.—This revision is directed against the order dated 20-12-1968 passed by the District Judge of Saran setting aside an ex parte order dated 25-4-1966 in Revocation Case No. 7 of 1965.

2. One Ramauva Tiwary obtained a probate of a will dated 15-4-1889 executed by Nand Kumar Tiwary. common ancestor of the parties. The petitioners filed a petition before the District Judge, Saran, for revocation of the aforesaid probate of the will u/s 263 of the Indian Succession Act. The said application was registered as Revocation Case No. 7 of 1965. The contention of the petitioners in the revocation case was that Ramagva Tiwary in collusion with others filed the probate case without impleading the petitioners as party to the proceedings and hence they prayed for revoking the grant of probate. It is alleged that the opposite party did not appear in spite of service of notice on them and hence the matter was taken up ex parte for hearing before the District Judge who by his order dated 25-4-1966 allowed the prayer of the petitioners and the grant of the probate of the will in question was revoked.

3. Thereafter, the opposite party filed an application under O. IX, Rule 13 of the CPC for setting aside the ex parte revocation order passed by the District Judge on 25-4-1966. The learned District Judge, on a consideration of the evidence adduced before him held that there was sufficient cause for the non-appearance of the opposite party when the Revocation Case No. 7 of 1965 was called out for hearing. Accordingly, the learned District Judge by his order dated 20-12-1968 set aside the ex parte order passed in Revocation Case No. 7 of 1965.

4. Being dissatisfied with the aforesaid order passed by the District Judge on 20-12-1968, the petitioners have come up to this Court in revision and the only point which has been urged in this case is whether the learned District Judge had any jurisdiction to set aside the ex parte revocation order passed in Revocation Case No. 7 of 1965. In other words, the contention of learned counsel, appearing for the petitioners, is that provisions of Order IX. Rule 13 of the CPC are inapplicable to the probate proceedings. In support of this contention reliance is placed on the case of *Gorakh Ahir Vs. Jamuna Ahir*, . In this case, no doubt, their Lordships have observed that provisions of Order 9 Rule 9 of the CPC have no application to a case for grant of probate of a will. On the basis of this decision, it has been strenuously argued on behalf of the petitioners that provisions of Order 9. Rule 13 of the CPC as well should be held to be inapplicable to probate proceedings and that the learned District Judge had no jurisdiction to set aside ex parte revocation order by taking recourse to the provisions of Order 9, Rule 13 of the Code

5. It may be stated that Section 141 of the CPC lays down that "the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction". To the similar effect is the provision of law laid down in Section 268 of the Indian Succession Act which recites as follows:

"The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure. 1908."

On reading these two provisions of the law referred to above, it follows that the CPC will apply to all proceedings before the District Judge in relation to the granting of probate and letters of administration so far as the circumstances of the case permit.

6. In the case reported in *Gorakh Ahir Vs. Jamuna Ahir*, referred to above, their Lordships of the Patna High Court relied on the case of *Ramani Debi v. Kumud Bandhu Mukherji* reported in (1910) CriLJ 185. In the Calcutta case, it was held that the dismissal for default of an application for probate does not amount in law to an adjudication upon the question of the genuine character and legal validity of the will and, therefore, such a dismissal cannot debar a second application for probate. In the Calcutta case, the question for consideration was

whether Section 103 of the Code of Civil Procedure, 1882. which is equivalent to the provision of Order 9, Rule 9 of the Code of Civil Procedure. 1908, will operate as a bar to a fresh application for probate. u/s 103 of the Code of 1882. a party whose suit was wholly or partly dismissed was precluded from bringing a fresh suit in respect of the same cause of action. In the opinion of their Lordships of the Calcutta High Court, a party interested has right to make a second application for the grant of probate even if his first application was dismissed for default- In this view of the matter, their Lordships were of the view that Section 103 of the Code of 1882 should not be held applicable to dismissal for default of an application for probate because the party interested could not be precluded from filing a fresh application for grant of probate in respect of the will.

7. Their Lordships of the Patna High Court in *Gorakh Ahir Vs. Jamuna Ahir*, have followed the aforesaid principles of law enunciated in (1910) Cri LJ 185 and observed that in the circumstances of the case the provisions of Order 9. Rule 9 of the CPC have no application to an application for grant of a probate. This means that the party interested cannot be precluded from filing a fresh application for grant of probate when his previous application for grant of probate was dismissed for default. It has already been referred to above that the provisions of the CPC have been made applicable to probate proceedings so far as the circumstances of the case will permit. The rights and privileges of a party under the provisions of the Indian Succession Act cannot be taken away by application of the provisions of Order 9. Rule 9 or Order 9, Rule 13 of the Code of Civil Procedure. "Section 141" says Bachawat. J.. at page 1801. Column 1. in *Nawab Usmanali Khan Vs. Sagarmal*, , "makes applicable to other proceedings only those provisions of the Code which deal with procedure and not those which deal with substantive rights".

8. In this connection, learned counsel appearing for the petitioners has also referred to the case of *Jugeshwar Nath Sahai and Another Vs. Jagatdhari Prasad and Others*, wherein it has been observed that the provisions of Order 23, Rule 1 of the CPC do not apply to an application for grant of a probate. He has further urged that in the case of *Saroda Kanto Dass v. Gobindo Mohan Das* reported in (1910) Cri LJ 91 similar view was expressed by their Lordships. It will appear that an application for probate cannot legally be disposed of by compromise because it is the duty of an applicant for probate to obtain the opinion of the Court upon the genuineness or the otherwise of the will. It was held in the circumstances of these cases that provisions of Order 23, Rule 1 have no application to a probate proceeding. A judgment in a probate case is a judgment in rem and cannot be given on compromise.

9. A reference may also be made to the case of *Dintarini Dabi v. Doibo Chunder Roy*, reported in ILR (1882) Cal 880. In this case their Lordships have clearly observed that provisions of Section 647 of the Code of Civil Procedure, 1882 (which is equivalent to Section 141 of the CPC 1908) will be followed as far as it can be made applicable in all Courts of Civil jurisdiction. In this case an ex parte

decree was obtained in a probate case and the party against whom the ex parte order was passed came up before the Court and asserted that he had no notice of the proceeding. Their Lordships observed that the aggrieved party could come up before the Court for giving prima facie evidence that he had no notice of the proceeding. Learned Counsel appearing for the opposite party has referred to a case of Rup Lal v. Manohar Lal. reported in AIR 1936 Lah 863 wherein it is clearly observed that provisions of Order 9, Rule 9 of the CPC are applicable to probate proceedings. Considering the circumstances of the case, I am of opinion that the provisions of Order 9, Rule 13 of the CPC are applicable to probate proceedings and. as such, it cannot be stated that the learned District Judge has no jurisdiction to set aside the ex parte revocation order passed in| Revocation case No. 7 of 1965.

10. In the result, there is no merit in this revision application which is accordingly dismissed. In the circumstances of the case. I direct both the parties to bear their own costs.

Unxwalia, J.

11. I agree.