
(2012) 12 GAU CK 0022
In the Gauhati High Court
Case No : Review Petition No. 79 of 2011

Rama Mukherjee (Bhowmik) (Dr.)

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 12-12-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(c), Order 43 Rule 1(r), Order 43 Rule 1(r)
Constitution of India, 1950 — Article 226
Hindu Marriage Act, 1955 — Section 11
Succession Act, 1925 — Section 268, 269, 276, 295, 299

Citation : (2013) 1 GLT 279

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : P.K. Bhowmik, Mr. S. Sarma, Mr. G. Goswami, Ms. B. Devi and Mr. H.K. Das, for the Appellant; A.K. Bhattacharyya, A.K. Choudhury, Ms. T. Talukdar and Ms. A. Dekka, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—The petitioner in WP (C) No. 6127/2010 has filed this application seeking review of the order dated 20th April, 2011 passed by this Court dismissing the writ petition by giving liberty to her to challenge the order of injunction passed by the probate Court in an appeal to be preferred under Order 43 Rule 1(r) of the CPC and also refusing to entertain the writ petition praying for declaration that the will, which is sought to be probated in the probate proceeding is a manufactured, sham, colourable, collusive and fake document, as the said question cannot be gone into in a writ proceeding, which requires examination of evidence and as such, conveniently can be gone into by the probate Court while deciding the probate proceeding instituted by the respondent No. 4. The facts relevant for the purpose of consideration and disposal of the review petition may be noticed as under:-

The respondent No. 4 in the writ petition as well as in the review petition filed an

application u/s 276 of the Indian Succession Act, 1925 (in short, "the Act") seeking probate of a will, allegedly executed by Soumendra Mohan Mukherjee, in the Court of the learned District Judge, Sonitpur at Tezpur, which was registered and numbered as Misc. (P) Case No. 36/2010. An application seeking injunction under Order 39 Rules 1 and 2 read with Section 151 CPC was also filed, which was registered and numbered as Misc. (J) Case No. 37/2010. An ad-interim order of injunction was passed on 20th March, 2010. The petitioner on receipt of the notice entered appearance and filed the objections in both the aforesaid proceedings objecting the prayer for grant of probate as well as the prayer for issuance of injunction. In the objection filed against the prayer for grant of probate, the petitioner inter-alia contended that the will is manufactured one; was not executed as required under the provisions of the Act; that the will was drafted after the death of Soumendra Mohan Mukherjee and is a fabricated document and has been manufactured by the applicant seeking probate of the will; that the marriage between Soumendra Mohan Mukherjee, the testator, and Mitra Mukherjee (respondent No. 4) is hit by the provisions of Section 11 of the Hindu Marriage Act, 1955; that there are suspicious circumstances surrounding the execution of the will. In the show cause filed by the review petitioner against the prayer for injunction, amongst others, it has also been contended that the probate proceeding being not a suit, no temporary injunction under Order 39 Rules 1 and 2 read with Section 151 CPC could be granted and as such, entertainment of such injunction petition and grant of ad-interim injunction is wholly without jurisdiction.

2. The probate Court upon hearing the learned counsel for the parties made the ad-interim injunction absolute vide order dated 24th September, 2010. The review petitioner thereafter, filed the writ petition challenging the legality and validity of the ad-interim order of injunction dated 20th March, 2010, order dated 24th September, 2010 making the said order absolute, passed in Misc. (J) Case No. 37/2010. The review petitioner also prayed for quashing the will as manufactured, sham, colourable, collusive and fake document apart from the probate proceeding initially registered as Misc. (P) Case No. 36/2010, and was reregistered as T.S. (P) No. 43/2010.

3. This Court upon hearing the learned counsel appearing for the parties, vide order dated 20th April, 2011 dismissed the writ petition as an appeal lies against the order of injunction and the question as to whether the will is manufactured, sham, colourable, collusive or fake document cannot be gone into in a writ proceeding, as for determination of the said question of fact, evidence is required to be led, which can conveniently be done by the probate Court.

4. I have heard Mr. P.K. Bhowmik, learned senior counsel for the petitioner, Mrs. V.L. Singh, learned State counsel appearing for the respondent Nos. 1 to 3 and Mr. A.K. Bhattacharyya, learned senior counsel appearing for the respondent No. 4.

5. It has been contended by Mr. Bhowmik, learned senior counsel for the

petitioner that since the probate proceeding is not a suit, an application under Order 39 Rules 1 and 2 read with Section 151 CPC for grant of temporary injunction is not maintainable and hence, the probate Court had no jurisdiction to entertain such an application and to pass an order, which can be challenged in a writ proceeding, such order having been passed without jurisdiction. The learned senior counsel submits that this Court while dismissing the writ petition vide order dated 20th April, 2011 did not take into consideration that aspect of the matter and has dismissed the same on the ground of having an alternative remedy by way of an appeal under Order 43 Rule 1(r) of the CPC, though such an appeal is not maintainable, there being no jurisdiction vested on the probate Court to entertain the application under Order 39 Rules 1 and 2 CPC. The learned senior counsel referring to the decision of the Apex Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, has further submitted that the High Court can entertain a writ petition even when an alternative remedy is available, provided such writ petition is filed seeking enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or the proceedings are wholly without jurisdiction or where the vires of an act is under challenge. According to the petitioner, since the order of injunction has been put to challenge in a writ proceeding on the ground that the probate Court has no jurisdiction to pass an order of injunction, the writ petition ought not to have been dismissed on the ground of having an alternative remedy, even if such an alternative remedy is available. It has also been submitted that the very basis of initiation of the probate proceeding, i.e. the will, being a manufactured, sham, colourable, collusive and fake document, the probate Court ought to have dismissed the probate proceeding on the threshold and on receipt of the objection filed by the petitioner, so as to nip such false, vexatious, fraudulent and frivolous litigation of the respondent No. 4 in buds, as held by the Apex Court in T. Arivandandam Vs. T.V. Satyapal and Another, .

6. Mr. Bhattacharjee, learned senior counsel appearing for the respondent No. 4, on the other hand, submits that the review petitioner could not make out any ground for review of the order dated 20th April, 2011 passed by this Court dismissing the writ petition. It has been submitted that the probate Court u/s 269 of the Act can pass an order of injunction and as such, it cannot be said that the order of injunction passed by the probate Court is wholly without jurisdiction, even though the application was stated to be filed under Order 39 Rules 1 and 2 read with Section 151 of the CPC. The learned senior counsel submits that mention of a wrong provision in an application cannot be the ground for rejection of such application and the same can be entertained and order can be passed by the probate Court u/s 269 of the Act. The learned counsel further submits that as the probate proceeding partakes the character of a regular suit, when such proceeding is contested, the same is required to be decided, according to the provisions of the CPC, in view of Section 295 of the Act and hence this Court has rightly dismissed the writ petition by refusing to entertain the same on the

ground of having an alternative remedy by way of an appeal under Order 43 Rule 1(r) of the CPC. Mr. Bhattacharyya further submits that even if an appeal under Order 43 Rule 1(r) is not maintainable, since the probate Court, in view of the provisions contained in Section 269 of the Act, has the power to pass an interim injunction, such an order is appealable u/s 299 of the Act.

7. Mr. Bhattacharyya further submits that whether the will is a manufactured, sham, colourable, collusive and fake document is a question of fact, which is required to be gone into by the probate Court in the probate proceeding and cannot be decided by the writ Court without recording any evidence and hence the writ Court has rightly passed the order dated 20th April, 2011 dismissing the writ petition which challenged the will and the probate proceeding.

8. Mr. Bhattacharyya in support of his contention has placed reliance, on a full Bench judgment of this Court in *Nira Kanta Chutia Vs. Smti. Bedoi Chutiani & Anr.* reported in AIR 1977 Gauhati 70, wherein it has been held that the probate Court can entertain an application under Order 9 Rule 9 CPC for setting aside an order of dismissal of an application seeking probate for default and against the order rejecting such application, an appeal lies under Order 43 Rule 1(c) CPC, in a contested probate proceeding in view of the provisions contained in Section 295 of the Act.

9. Mrs. Singh, learned State counsel appearing for the respondent Nos. 1 to 3 supports the submissions advanced by Mr. Bhattacharyya, learned senior counsel appearing for the respondent No. 4.

10. I have considered the submissions advanced by the learned counsel appearing for the parties.

11. Though there is no specific provision conferring the power of review, on the High Court, of the order passed in a writ proceeding under Article 226 of the Constitution, the power of review inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. It can be exercised by the High Court within the definite limits to exercise such power of review. The High Court can review its own order on discovery of new and important matter or the evidence which, after the exercise of due diligence was not within the knowledge of the persons seeking the review or could not be produced by him at the time when the order was made. It may also exercise the power where some mistake or error apparent on the face of the record is found or on any analogous ground. The order passed, however, cannot be reviewed on the ground that the decision was erroneous on merits, which would be the province of a Court of appeal.

12. In the instant case, as noticed above, the probate proceeding was filed seeking probate of the will allegedly executed by the testator Soumendra Mohan Mukherjee. The said proceeding has been contested by the petitioner by filing objections contending inter alia that the will is manufactured, sham, colourable, collusive and fake document and as such, the said proceeding needs to be

quashed. The questions whether the will is manufactured, sham, colourable, collusive and fake document or the person seeking the probate could prove due execution of the will as required by law by removing suspicious circumstances, if any, to the satisfaction of the probate Court, are questions of fact, which have to be gone into by the probate Court in the probate proceeding. Such question of fact naturally cannot be gone into in a writ proceeding, that too, without examination of evidence, and to declare that the will is manufactured, fake or execution of it has not been duly proved. The Act having provided the manner in which the will is to be probated, it is for the probate Court to decide about the objection raised by the objector relating to the execution of the will. The probate Court, therefore, cannot dismiss the probate proceeding at the threshold only on the basis of the objection of the objector that the will is manufactured, sham, colourable, collusive and fake document. The said question has to be gone into by the probate Court after recording the evidence of the parties. As because the objector has raised such objection, it cannot be said, before examination of evidence, that such proceeding is frivolous and hence it should be dismissed at the threshold. This Court vide order dated 20th April, 2011 passed in the writ petition has rejected such challenge made in the writ proceeding, on the ground that such question cannot be gone into in the writ proceeding for which evidence is to be recorded and has to be gone into by the probate Court.

13. In *T. Arivandandam* (supra), the Apex Court has held that if on a meaningful, not formal, reading of the plaint it is manifestly found to be vexatious and meritless, in the sense of not disclosing a clear right to sue, the High Court should exercise the power under Order 7 Rule 11 CPC and dismiss the suit. It has also been observed that the frivolous and vexatious suit should be nipped in bud by dismissing such suit at the threshold. There is no dispute to the said proposition of law. In the instant case, as noticed above, according to the respondent No. 4, the testator, Soumendra Mohan Mukherjee, executed a valid will bequeathing the property, and for grant of probate she filed the probate proceeding. The same has been objected to by the petitioner by contending inter alia that the will is manufactured, sham, colourable, collusive and fake document. The said question of fact as to whether the will is manufactured, sham, colourable, collusive and fake document, as noticed above, is to be gone into by the probate Court and solely on the ground of the objection filed, the probate proceeding cannot be dismissed at the threshold. Hence the principle of law laid down by the Apex Court in *T. Arivandandam* (supra) cannot be applied in the case in hand.

14. Section 295 of the Act provides that in any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant. As soon as the probate proceeding is objected to by the objector by filing any objection, it, therefore, undertakes the character of a

regular suit and the provisions of the CPC shall be followed in deciding such proceeding.

15. Section 268 of the Act provides that the proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, unless otherwise provided, be regulated, so far as circumstances of the case permit, by the CPC. Section 269 empowers the District Judge to interfere for protection of property. It provides that until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

16. The aforesaid provisions, therefore, empowers the probate Court to pass an interim order to protect the property. In the instant case, the application for grant of injunction was allowed initially by passing an ad-interim order and thereafter, making the said interim order absolute after hearing the petitioner, who has contested the probate proceeding as well as the injunction by filing objections. The probate proceeding, on objection being filed by the petitioner, therefore, partakes the character of a regular suit and the provisions of the CPC have to be applied while deciding such proceeding.

17. A full Bench of this Court in *Nira Kanta Chutia* (supra), while dealing with the power of the probate Court to entertain an application under Order 9 Rule 9 CPC, after noticing the provisions contained in Sections 268, 295 and 299 of the Act has held that in a contentious probate proceeding since the provisions of the CPC are applicable by virtue of Section 268 of the Act, an application under Order 9 Rule 9 CPC lies for setting aside of an order dismissing the application for probate for default and also an appeal under Order 43 Rule 1(c) CPC is maintainable when such application filed under Order 9 Rule 9 CPC was rejected.

18. As noticed above, on being contested the probate proceeding as well as the prayer for injunction by the petitioner, the said probate proceeding partakes the character of a regular suit and the provisions of the CPC shall be applicable, in view of Section 295 of the Act. That apart, the probate Court can also pass an interim injunction u/s 269 of the Act, even if the application under Order 39 Rules 1 and 2 of the CPC is not maintainable. The provisions of the CPC being applicable in a contentious proceeding, the order dated 24th September, 2011 making the order of injunction absolute, upon consideration of the objections filed is appealable under Order 43 Rule 1(r) CPC and, if not, is definitely appealable u/s 299 of the Act.

19. The writ Court has imposed upon itself certain restrictions to entertain a writ proceeding, one of which is having an effective and efficacious remedy, when the

writ Court normally would not exercise the writ jurisdiction. However, the availability of an alternative remedy is not always a bar to entertain a writ proceeding by the writ Court. The writ proceeding, even if there is an efficacious alternative remedy available, can be entertained, as held by the Apex Court in Whirlpool Corporation (*supra*), in at least three contingencies, namely where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is under challenged.

20. In the instant case, according to the petitioner, the order of injunction passed by the probate Court is wholly without jurisdiction and as such, the writ petition ought not to have been dismissed on the ground of having an alternative remedy. The contention of lack of jurisdiction, in passing an interim order, in view of the aforesaid discussion, cannot be accepted and hence rejected. The order granting injunction being appealable under Order 43 Rule 1 (r) CPC or u/s 299 of the Act, the writ petition was rightly not entertained and dismissed vide order dated 20th April, 2011. In view of the above, there is no ground for review of the order dated 20th April, 2011 passed in the writ petition and hence the review petition is dismissed. No costs.