
(2012) 08 MP CK 0175
In the Madhya Pradesh High Court
Case No : M.A. No. 504 of 2009

Ramesh Chandra

APPELLANT

Vs

Mahendra Kumar Sahu and Balchand Sahu

RESPONDENT

Date of Decision : 21-08-2012

Acts Referred:

Succession Act, 1925 — Section 276, 281, 384

Citation : AIR 2013 MP 35 : (2012) ILR (MP) 3054 : (2012) 5 MPHT 420 :
(2012) 4 MPLJ 441 : (2013) 1 RCR(Civil) 745

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : Adil Usmani, for the Appellant; None, Though Served, for the Respondent

Final Decision : Allowed

Judgement

Justice A.K. Shrivastava

1. This appeal u/s 384 of Indian Succession Act, 1925 (for short the Succession Act) has been filed by the appellant assailing the impugned order dated 31.10.2008 whereby his application u/s 276 for grant of probate of the Will has been rejected by the Court below. The facts leading for the disposal of this appeal lie in a narrow compass. Suffice it to say that an application u/s 276 of the Succession Act was submitted by the applicant/appellant stating therein that Ramdayal who was his maternal uncle had died on 14.4.1994 and before his death a Will was executed by him in favour of the appellant namely Ramesh Chandra but the respondents are denying the execution of the Will and hence he filed an application u/s 276 of the Succession Act for grant of probate to him.

2. The first respondent namely Mahendra Kumar Sahu did not appear in the court below despite he was served. However, respondent No. 2 Balchand Sahu by filing written reply refuted the averements made in the application of the grant of probate and prayed that the Will is forged, fabricated and concocted document

and hence the appellant is not entitled for any probate.

3. The learned Court below framed necessary issues and after recording the evidence of the parties gave a categorical finding in para 30 that the Will (Ex. A/1) is a forged document, has not been proved by the respondents. On the other hand it is proved that a valid Will was executed by the testator in favour of the appellant and issue 3(A) was decided in affirmative in favour of the appellant while issues 3(B) and (C) were decided in negative against the respondents. However, the learned Court below dismissed the application of the appellant simply on the ground that verification was not made by the witness to the Will in terms of Section 281 of the Succession Act.

4. In this manner, this appeal has been filed by the appellant. The contention of Shri Adil Usmani, learned counsel for the appellant is that the aforesaid clause made in Section 281 is only directory and not mandatory and if that would be the position, merely on this technical ground the application of the grant of probate which has been otherwise found to be proved by the Court below ought not to have been dismissed.

5. No one appeared on behalf of the respondents despite they were served. Indeed, respondent No. 1 did not appear even in the Court below.

6. Having heard learned counsel for the appellant and after perusing the record, I am of the view that this appeal deserves to be allowed.

7. Undisputedly, an application u/s 276 of the Succession Act was submitted by the appellant to obtain a probate. While adjudicating the said application, learned Court below decided Issue No. 3(A) in affirmative in favour of the appellant holding that a valid Will has been executed by the testator in his favour and issues 3(B) and (C) have been decided against the respondents holding that the Will is fabricated is not at all proved. The Court below further held that because the testator had died issueless, the property would vest in Ramesh Chandra on account of a Will (Ex. A1) executed in his favour. Thus, the execution and attestation of the Will in favour of the appellant has been duly proved and despite Balchand has been served in this appeal he has not challenged the issues decided against him by filing any cross objection and in this manner, the findings arrived at by the Court below against him has attained finality.

8. On bare perusal of Section 281 of the Succession Act, this Court finds that a verification has to be made atleast by one of the attesting witness to the Will (when procurable) in the manner or to the effect as prescribed in the Section. It would be profitable to quote the entire Section 281 of the Succession Act which reads thus:

281. Verification of petition for probate, by one witness to the Will.-Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the Will (when procurable) in the manner or to the effect following, namely: "I (C.D.), one of the witnesses to the last Will and testament of the

testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence).

By putting emphasis upon the words "when procurable", this Court is of the view that the word "shall" which has been used in this Section would not mean that the provision contained in this Section is mandatory and it was mandatory on the part of the applicant who files application to obtain probate to get the application verified in terms of Section 281 by the attesting witness to the Will. According to me, it is only directory for the simple reason that if it would have been mandatory certainly the witness would not have verified the application of probate if he had died before filing the application by the applicant to obtain probate u/s 276 of the Succession Act. Thus, I have no scintilla of doubt in holding that the term "shall" which is used in this Section is only directory, otherwise within bracket the term "when procurable" would not have been enacted. Near about ninety years ago, the Judicial Commissioner of Nagpur in Ramasinha Rajput Vs. Murtibai 1923 Nagpur 41 has taken this view which still holds the field since this decision has been relied twice by this Court, firstly in Jamunabai and Others Vs. Surendra Kumar and Another, and secondly in Chhedilal Vs. Chukkho Bai 1997 (2) M.P.W.N. 230.

9. According to me, if the Court while deciding the application was of the view that the application for the grant of probate should have been verified by the attesting witness, the Court should have directed the applicant to get the verification made upon the application. But by adopting a hyper-technical view particularly when Section 281 is not mandatory and is only directory, the application of probate which was otherwise found to be proved by the Court below should not have been dismissed. For the reasons stated hereinabove, this appeal is allowed. The impugned order so far as it relates to dismissal of the application on account of non verification of the application of probate filed u/s 276 of the Succession Act is hereby set aside. Rest part of the order is hereby affirmed. The learned Court below shall now issue probate to the appellant. Since nobody has come to oppose the appeal, the appellant is hereby directed to bear his own costs.