

(1969) 08 GAU CK 0005
In the Gauhati High Court
Case No : First Appeal No. 18 of 1967

Sagar Chaudhury and Others	Vs	APPELLANT
Nabin Ch. Chaudhury and Others		RESPONDENT

Date of Decision : 28-08-1969

Acts Referred:

Bengal, North- Western Provinces, Agra and Assam Civil Courts Act, 1887 — Section 3, 4, 6(1), 8, 8(1)
Criminal Procedure Code, 1898 (CrPC) — Section 9(3)
Succession Act, 1925 — Section 2, 264(1), 266, 267, 268

Citation : (1969) 08 GAU CK 0005

Hon'ble Judges : S.K. Dutta, C.J.; M.C. Pathak, J

Bench : Division Bench

Advocate : J.C. Medhi, B.K. Goswami and S.C. Das, for the Appellant; J. Choudhuri, B.K. Sarma and B.C. Sarma, for the Respondent

Final Decision : Allowed

Judgement

M.C. Pathak, J.—This appeal is directed against the judgment and decree passed by the learned Additional District Judge, L.A.D., Gauhati.

2. The Plaintiff's case is that Anandiram Choudhuri who died a natural death on 18-4-1963 at village Jiakur in Mouza Bakhin Sarubongshar, P. S. Chhaygaon within the Jurisdiction of the District Judge, L.A.D at Gauhati, left a will dated 27-3-63 No executor was appointed by the said will and the Plaintiff was the only legatee entitled to the Letters of Administration under it. He filed an application in the Court of the Subordinate Justice No. 1, L.A.D., Gauhati, praying for letters of administration. Notices were served on the relatives of the deceased and Defendants Nos. 1, 2 and 3 filed an objection to the issue of letters of administration. The matter being contentious, the Subordinate Judge returned the petition for filing it in proper Court. Accordingly the Plaintiff filed the petition before the District Judge impleading the three objectors as well as Mustt. Pahibala Choudhury, step mother of the deceased, as Defendants. The petition before the District Judge was treated as a plaint and numbered as Probate Title

Suit No. 39 of 1963. The learned District Judge transferred the suit to the Additional District Judge, Gauhati, on 23-11-1964, for favour of disposal and it was renumbered as Probate Title Suit No. 3/65.

3. Defendants 1, 2 and 3 filed a joint written statement and contested the suit. They alleged that the testator did not execute the will, and it was forged in collusion with the writer of the will. During the pendency of the suit, Defendant No. 3 Nakul Chandra Choudhuri died and his legal heirs were substituted. The minor legal heirs were represented by their mother Srimati Harimali Chaudhury.

4. The following issues were framed on the pleadings of the parties:

1. Whether the probate suit is maintainable in the present form?
2. Whether the will in question was at all executed by late Anandi Choudhuri and if executed whether it was validly executed?
3. Whether the will in question as well as the signature thereon was forged?
4. Whether the Petitioner (Plaintiff) is entitled to a probate as prayed for?
5. To what relief, if any, are the parties entitled?

5. Evidence was adduced by both the parties and the learned Additional District Judge, on a consideration of the evidence on record, decreed the suit on contest and directed the issue of letters of administration to the Plaintiff with a copy of the will-annexed, holding that the will was a genuine one and the signature in the will was that of the testator.

6. Dr. Medhi, the learned Counsel appearing for the Appellants, submitted that the Additional District Judge, L.A.D., Gauhati had no jurisdiction to entertain and decide the instant suit. The learned Counsel submitted that u/s 270 of the Indian Succession Act, probate of the will or letters of administration to the estate of the deceased person might be granted by the District Judge only and not by the Additional District Judge,

7. Section 270 of the Succession Act reads as follows:

Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode or any property, moveable or immovable, within the jurisdiction of the Judge.

8. Section 264(1) of the Succession Act reads as follows:

The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within 1st district.

9. Section 2(bb) of the Succession Act defines "District Judge" as follows:

"District Judge" means the Judge of a principal Civil Court of original jurisdiction.

10. The Notification in the Assam Gazette dated 13-2-63 by which Sri D. C. Sarma was appointed as Additional District Judge is as follows:

No. LJJ.78/61/S0: In exercise of the powers conferred by Sub-suction (1) of Section 8 of the Bengal, Agra and Assam Civil Courts Act 1887 and Sub-section (3) of Section 9 of the Code of Criminal Procedure, 1898, the Governor of Assam is pleased to appoint Shri Dharendra Chandra Sarma, B. Com., Bar-at-Law, Advocate to officiate as Additional District and Sessions Judge, Lower Assam Districts with headquarters at Gauhati with effect from the date he takes over as such, vice Shri Bhola Nath Sarma promoted.

Under the said Notification, Mr. D. C. Sarma has been appointed as Additional District Judge u/s 8(1) of the Bengal, Agra and Assam Civil Courts Act, 1887. Section 8(1) of Bengal, Agra and Assam Civil Courts Act, 1887 (hereinafter referred to as Civil Courts Act) relates to Additional Judges, Section 3 of the Civil Courts Act is as follows:

There shall be the following classes of Civil Courts under this Act, namely:

- (1) the Court of the District Judge;
- (2) the Court of the Additional Judges
- (3) the Court of the Subordinate Judge³ and
- (4) the Court of the Munsif

11. It is submitted by Dr. Medhi that since Sri D. C. Sarma was appointed by the Government Notification u/s 8(1) of the Civil Courts Act, it must be held that he was appointed as Additional Judge which was a separate class of the civil courts, quite distinct from the court of the District Judge, and since Section 270 of the Succession Act empowered the District Judge only to issue probate or the letters of administration, the Additional Judge which was a separate class of courts from that of the District Judge had no jurisdiction to issue probate or letters of administration. In this connection Dr. Medhi referred to *Kuldip Singh v. The State of Punjab* AIR 1956 SC 391, wherein the following passage occurs at page 399:

When the Chief Justice of a High Court or the District Judge of a District Court makes an administrative allotment of work among, the Judges of his Court, their jurisdiction and powers are not affected, and if work allotted to one Judge goes to another by mistake his jurisdiction to entertain the matter and deal with it is not affected. But that is not the scheme of the Punjab Courts Act and the mere fact that Mr. J. N. Kapur called himself the Additional District Judge and purported to act as such cannot affect the matter of his jurisdiction.

As the Punjab Courts Act does not contemplate the appointment of Additional Judges to the District Court, none can be appointed. The Court contemplated is

the Court of the Additional Judge which is in the nature of a special tribunal set up for a special purpose and invested with the powers of a District Judge when dealing with the matters specially entrusted to its jurisdiction. We hold therefore that the Court of the Additional Judge is not a division Court of the Court of the District Judge but a separate and distinct Court of its own.

12. The point that arises for our consideration is whether the Court of the Additional District Judge in Assam is a separate and distinct Court of its own or it is a division Court of the Court of the District Judge.

13. Section 4 of the Civil Courts Act runs as follows:

The State Government may alter the number of District Judges, Subordinate Judges and Munsifs now fixed.

14. Section 6(1) of the Civil Courts Act is as follows:

Whenever the office of District Judge or Subordinate Judge is vacant by reason of the death, resignation or removal of the Judge or other cause, or whenever an Increase in the number of District or Sub- ordinate Judges has been made under the provisions of: Section 4, the State Government or as the case may be the High Court may fill up the vacancy or appoint the Additional District Judge or Subordinate Judge.

15. Section 8 of the Civil Courts Act is as follows:

(1) When the business pending before any District Judge requires the aid of. Additional Judges for its speedy disposal, the State Government may. having consulted the High Court appoint such Additional Judges as may be requisite.

(2) Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge.

16. From *Kuldip Singh Vs. The State of Punjab and Another*, (supra), it is found that there was no provision in the Punjab Courts Act for appointment of Additional Judges to the District Court and in that view it was held that though Mr. J. N. Kapur called himself the Additional District Judge he was in fact the Additional Judge which was a separate and distinct court of its own u/s 6(1) of the "Civil Courts Act", however, there is provision for appointment of Additional District Judge whenever the circumstances mentioned therein require for such appointment. In Assam as we find there is no separate Court of the Additional Judge. In the circumstances, the appointment of Mr. D. C. Sarma as Additional District Judge must be held to be an appointment u/s 6(1) of the Civil Courts Act, though it was incorrectly mentioned in the Government Notification dated 13-2-63 that he was appointed u/s 8(1) of the Civil Courts Act.

17. In this connection, AIR 1949 408 (Nagpur) may be considered. After considering the definition of the District Judge as given in Section 2(bb) of the Succession Act and the language of Sections 266, 267, 268, 270 and 273(b) of

the Succession Act, the learned Judges of the Nagpur High Court observed that "there are indications in the Act that when the term "District Judge" is used it has reference not to a persona designata but to a Court and that Court is the principal civil court of original jurisdiction." We have already found that in Assam there is no separate Class of Court of Additional Judge and as such Mr. D. C. Sarma, the Additional District Judge, must have been appointed u/s 6(1) of the Civil Courts Act and the Court of the Additional District Judge must be held to be a division court of the Court of the District Judge and it is not a separate and distinct court of its own. As held by the Supreme Court in Kuldip Singh Vs. The State of Punjab and Another, (supra) the District Judge of a District Court may make administrative allotment of the work among the judges of his court and that does not affect their jurisdiction and powers. Probate and letters of administration under the Succession Act may be issued by the Court of the District Judge which is the Principal Civil Court of original jurisdiction. In the circumstances, we hold that the Additional District Judge in Assam has jurisdiction to decide matters relating to probate and letters of administration under the Indian Succession Act.

18. The next submission made by Mr. Medhi is that proper procedure laid down under the Indian Succession Act had not been followed in the instant case. He drew our attention to Section 268 of the Succession Act wherein it is provided that 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. The learned Counsel for the Appellants submitted that notice on Defendant No.4 Must. Pahibala Choudhury was not served and there was no order of the Court to the effect that the notice was served on her. On the other hand, the Court stated wrongly in its order dated 3-2-64 that all the Defendants filed a written statement whereas in fact, only Defendants 1, 2 and 3 filed a written statement. Non-service of summons on Defendant No. 4, according to the learned Counsel, vitiated the proceedings. In this connection, our attention was drawn by the learned Counsel for the Respondent that notice was, in fact, served on Pahibala Choudhury (Defendant No. 4) which was accepted by S. C. Choudhury, that is, Sagar Chandra Choudhury, Defendant No. 1. The notice is at page 27 of the original record wherefrom it appears that S. C. Choudhury accepted the notice and signed for Pahibala Choudhury. From the report of the Jarikarik on the notice it is found that notices on Defendants Nos. 2 and 4 were served on the members of their family as they were not found at home. Defendant No. 2 is Tithi Ram Choudhury and Defendant No. 4 is Must. Pahibala Choudhuri. On a consideration of the endorsement on the notice and the report of the Jarikarik, we are satisfied that notice of the suit was served on Defendant No. 4.

19. The learned Counsel for the Appellants submitted that after the death of Defendant No. 3, Nakul Chandra Choudhury, though his legal heirs were brought on record, no notice was served on the minor Defendants and nobody appeared

for the minor Defendants. After the death of Defendant No. 3 the Plaintiff filed an application supported by an affidavit for substitution of his legal heirs. Therein it is stated that the minor sons and daughters shown in the petition were under the care and protection of Must. Harimati Choudhuri, widow of late Nakul Choudhuri and she was the fit person to be appointed guardian of the minor in the suit and accordingly the prayer was made for the appointment of her as guardian of the minor sons and daughters for the purpose of the suit. The petition was filed on 14-6-65 and the Court passed the following order on 14-6-65:

The advocates for the parties present. The Petitioner (Plaintiff) files an application praying for substitution of heirs of O. P. No. 3 Nakul Choudhuri, who died on 19-5-65. It is further prayed that the mother Harimati Choudhuri should be appointed the legal guardian for the minor heirs for this suit. Heard the parties. Substitute the legal heirs of O. P. No. 3 in place of him and issue notice to them as prayed for. Srimati Harimati Choudhuri is also appointed as the guardian of the minors. Fix 5-7-65 for appearance. Steps within 5 days.

On 5-7-65 the Court passed the following order:

Defendants Aswini Kumar Choudhuri and Must. Harimati Choudhuri appeared on behalf of the minors through their advocate Shri S. C. Choudhuri and pray for time to file written statement and documents. The prayer is allowed. Time allowed till 30-7-65 for written statement and documents.

Thereafter additional written statement was filed by substituted Defendants Srimati Harimati Choudhuri and Asvini Kumar Choudhuri. Our attention has been drawn to the two Haairas dated 15-12-65 filed on behalf of "the Defendants. One is for Sagar Chandra Choudhuri and Tithiram Choudhuri. filed by the advocate. The other Hazira is for the minors and that is also filed by the same advocate. It is thus found that by the court's order the minors were represented in the suit by their mother who filed additional written statement in the case and the learned lawyer who appeared for the other Defendants also appeared for and on behalf of the minors as evidenced by the Hazira filed on 15-12-65.

20. On a consideration of the facts and circumstances of the case, we find that no prejudice has been caused to the minor Defendants in this case and they have been amply represented by their mother. We, therefore, hold that the learned Counsel's submission that the proceedings in the case were vitiated by non-compliance with the procedural law has no substance.

21. Dr. Medhi, the learned Counsel for the Appellants then submitted that on merits also the will was not proved to be legally executed by the testator. His submission was that the Defendants' definite case was that the signature of the testator in the will, Ext. 1, was a forged signature. There was apparently overwriting on the signature itself and it could not be said that the signature was in the handwriting of the testator who was a graduate. , The evidence on the side of the Plaintiff was that at the time of putting the signature the hand of the

testator trembled and therefore the signature appeared to be in a trembling hand and there was no overwriting on the signature. The learned Additional District Judge observed that "Shri" in the signature of the testator was doubly written and that showed that it was written with a shaky hand. But there" appeared some overwriting even on the latter portion of the signature, though the Additional District " Judge failed to observe that. In the circumstances, Dr. Medhi submitted that the learned Court should have allowed the Defendants to send the signature in the will for" examination by a handwriting-expert and after obtaining the report of the handwriting expert only he should have decided the case.

22. We have examined the signature of the testator in the original will and we find that there is some substance in this submission of the learned Counsel. As the defence case was that the signature was a forged one and the burden of proving it to be so lay on the Defendants, they should have been given a chance to send the signature to Handwriting. Expert for examination. The learned Additional District Judge failed to consider, properly this aspect of the matter. It is the settled law that for obtaining a probate or letters of administration, the propounder has to dispel all doubts regarding the execution of the will from the mind of the Court. given though the execution of the will is proved, still if any reasonable doubt remains in the mind of the Court regarding the genuineness of the will, a probate or letters of administration may be refused. In the instant case, the signature of the testator in the will appears to be. in a trembling band and to the naked eye also it appears that there is some kind of overwriting in the signature. In view of these circumstances, the learned trial Court should have allowed the Defendants to get the signature of the testator examined by a Handwriting Expert and obtain his opinion.

23. In view of the facts and circumstances of the case and for the ends of justice, we are of the opinion that the parties should be given reasonable opportunity to dispel all doubts regarding the genuineness of the will by producing the evidence of Handwriting Expert. We, therefore, set aside the judgment and decree of the learned Additional District Judge and remand the case to the District Judge, Gauhati, as there is no Additional District Judge: at present, for disposal on the evidence already on record as well as the evidence of Handwriting Expert regarding the signature of the testator in the will, that may be educed by the Defendants at their costs. The District Judge shall give reasonable" opportunity to the Defendants to produce the evidence of Handwriting Expert.

24. The appeal is thus allowed and the case is remanded to the District Judge, Gauhati, for disposal in accordance with law and in the light of the observations made above. We make no order as to costs of this appeal.

S.K. Dutta, C.J.

25. I agree.