

(2011) 12 GAU CK 0072
In the Gauhati High Court
Case No : CRP (Art. 227) No. 03 of 2011

Shri Arjun Chhetri

APPELLANT

Vs

Shri Kishore Chhetri

RESPONDENT

Date of Decision : 01-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(10), 2(2), 2(3)
Constitution of India, 1950 — Article 227
Succession Act, 1925 — Section 144, 2, 273

Citation : (2011) 12 GAU CK 0072

Hon'ble Judges : Swapan Chandra Das, J

Bench : Single Bench

Advocate : S.N. Meitei, Mr. R. Lalbiakzoma, for the Appellant; Zochhuana, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Das

1. In this application under Article 227 of the Constitution of India, the petitioner challenged Execution Proceeding No. 1 of 2004, wherein the Deputy Commissioner, Aizawl, passed an order dated 27.10.2004, directing execution of an order passed in Probate Case No. Misc.(SC) 5 of 1991.

2. The petitioner inter alia, stated that Dalu Chhetri and his wife Bhumakala Devi, since deceased, had no issue. They adopted Tosh Bahadur Chhetri (father of the petitioner), nephew of Dalu Chhetri as their adopted son. Dalu Chhetri died on 25.05.1973, leaving behind Bhumakala Devi, his wife and Tosh Bahadur Chhetri, adopted son. Tosh Bahadur obtained heir-ship certificate No. 69 of 1973 of the properties, left by Dalu Chhetri and mutated his name in place of Dalu Chhetri. Bhumakala Devi was all along residing with Tosh Bahadur in the house left by Dalu Chhetri, recorded in LSC No. 98 of 1968. In the year 1981, Bhumakala Devi left Tosh Bahadur and started living with Bhimlal Chhetri, another nephew. In 1981 Bhumakala Devi approached Sub-District Council Court

for cancellation of heir-ship certificate No. 69 of 1973, issued in the name of Tosh Bahadur and her prayer was allowed. Against the order Tosh Bahadur filed an appeal before the District Council Court but his appeal was dismissed and the order passed by Sub-District Council Court was upheld. Tosh Bahadur filed a petition before this Court, vide M.A.(S) 3 of 1983, which was renumbered as M.A. (S) 1 of 1990, and this Court was pleased to set aside both the orders passed by the Sub-District Council Court and the District Council Court and directed parties concerned to approach appropriate State Court of competent jurisdiction to decide the issue, if so advised.

In the meantime, both Bhumakala Devi and Tosh Bahadur Chhetri died. Tosh Bahadur was substituted by his wife Asha Devi, mother of the present petitioner and Bhumakala Devi was substituted by Bhimlal Chhetri, father of the respondent.

In 1991, Bhimlal Chhetri filed a petition for grant of probate in respect of the will left by Bhumakala Devi and that petition was registered as Misc.(SC) Case No. 5 of 1991. By that will, Bhumakala Devi, the Testator, bequeathed her all properties including that of the house property under LSC No. 98 of 1968 in favour of Bhimlal Chhetri. The probate certificate was granted by District Magistrate in favour of Bhimlal Chhetri on 06.11.1991.

It is the case of the petitioner that neither the petitioner nor his mother Asha Devi received any notice about that probate petition and it was decided in their absence. On 04.07.1994, Asha Devi filed review petition No. 1 of 1993 in the probate case but the same was dismissed. In 1994 the petitioner's mother filed title suit No. 2 of 1994 in the Court of Asstt. Deputy Commissioner, Aizawl but that suit was dismissed on 30.08.2001. Against that order, RFA No. 7 of 2001 was filed but that was dismissed for default on 17.02.2003. A restoration petition was filed which was registered as Misc. Appln. No. 6 of 2003 but that was rejected on 09.06.2003. Against that order FAO No. 2 of 2004 was filed before this Court and RFA No. 7 of 2001 was restored. It is further stated that on a petition filed by the father of the opposite party, the District Magistrate directed the Land Revenue Department to transfer the land of LAC No. 98 of 1968 in the name of Bhimlal Chhetri and that was complied. It is further stated that Execution Case No. 1 of 2004 was filed by the respondent to execute the order of probate and accordingly impugned order dated 27.10.2004 was passed by the Deputy Commissioner and the petitioner was evicted from the house of LSC No. 98 of 1968 on 30.11.2004. The petitioner filed WP(C) No. 85 of 2004 against the eviction order but that was withdrawn on 08.08.2006 with a liberty to file afresh. RFA No. 8 of 2006 was filed but that was also withdrawn with a liberty to file afresh on 15.01.2007. RFA No. 2 of 2008 was filed but withdrawn with a liberty to file afresh on 14.06.2010. The petitioner, thereafter, filed the present petition under Article 227 of the Constitution of India.

3. A bare perusal of the petition and the chronological dates and events submitted by the petitioner, it appears that the petitioner all along travelled

aimlessly and yet to approach the appropriate Court for the relief indicated in the order passed by this court on 10.07.1991.

4. Any way, a point raised in this petition as to whether a probate Court has got jurisdiction to execute the certificate of probate and in course of such execution whether the probate Court can pass an order of eviction.

5. According to the petitioner, Dalu Chhetri and Bhumakala Devi adopted Tosh Bahadur Chhetri as their adopted son but Tosh Bahadur or his successors are yet to establish that Dalu Chhetri or Bhumakala Devi legally adopted Tosh Bahadur Chhetri as their adopted son at any point of time. Mere obtaining of heir-ship certificate by Tosh Bahadur, being a nephew, after death of Dalu Chhetri, does not prove that Tosh Bahadur was an adopted son of Dalu Chhetri and Bhumakala Devi. The petitioner or his deceased parents are yet to approach the appropriate Court for a decision on the alleged claim of adoption of Tosh Bahadur as the son of Dalu Chhetri and Bhumakala Devi. The case of the respondent, as it appears, is that Bhumakala Devi, being the only heir left by Dalu Chhetri, executed a will bequeathing her properties to Bhimlal and Bhimlal presented that will for probate before the Court and the probate was granted. After the grant of probate on the prayer of Bhimlal, the Revenue records were changed and transferred in his name and the impugned execution petition was filed before the probate Court for execution of the certificate of probate and accordingly by impugned order the petitioner was evicted from the property.

6. Power under Article 227 of the Constitution of India is a special power vested on the High Court to have superintendence over the Courts and Tribunals throughout the territory in relation to which it exercises jurisdiction. While invoking the jurisdiction of Article 227, the High Court should exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority. It should not ordinarily intervene in the judicial functions of the lower judiciary. The independence of the sub-ordinate Courts in the discharge of their judicial functions is of a paramount importance, just as the independence of the superior Courts in the discharge of their judicial functions is. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. In this case, the probate Court entertained a petition for execution of the order passed by the probate Court and pursuant to that execution petition, the probate Court directed eviction of the petitioner from the house property probated in favour of the respondent.

7. The word "will" has been defined in Section 2(h) of the Indian Succession Act, 1925 thus:

(h) "will" means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.

The word "probate" has been defined in Section 2(f) thus:

(f) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration of the estate of the testator.

8. A petition for grant of probate is entertained as per the provisions prescribed in Chapter IV of the Indian Succession Act, 1925. Section 273 prescribed conclusiveness of probate. A certificate of probate cannot be termed as a decree passed by a Court of law. It is a certification made by a competent Court that the will left by the testator is genuine and be acted upon.

The word, "decree" has been defined in Section 2(2) of CPC Thus:

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

The word, "decree-holder" has been defined in Section 2(3) of CPC Thus:

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

The word, "judgment-debtor" has been defined in Section 2(10) of CPC Thus:

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

Only a decree passed by a competent Court or an order capable of execution can be executed by a petition before the competent Court as prescribed under the Code of Civil Procedure. The probate Court has gone beyond jurisdiction while entertaining the execution petition and directing eviction under such execution petition. The impugned order was passed on 27.10.2004 and according to the petitioner he has already been evicted pursuant to that order from the house property left by Dalu Chhetri. This petition has now become otiose after lapse of more than six years. The petitioner would approach appropriate Court in appropriate time against the order and, at present, I find no justification at all to issue any direction on the probate Court or any other Court. It is, however, held that the probate Court acted beyond its jurisdiction and should not have entertained such a petition for execution while certificate of probate was neither a decree nor an executable order.

9. The petition accordingly stands disposed of.