
(2010) 01 OHC CK 0029
In the Orissa High Court

Smt. Subasini Choudhury

APPELLANT

Vs

Smt. Bisakha Kar and Others

RESPONDENT

Date of Decision : 13-01-2010

Acts Referred:

Succession Act, 1925 — Section 276, 63

Citation : AIR 2010 Ori 174 : (2010) 110 CLT 62 : (2010) 2 OLR 70

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.M. Das, J.—This appeal has been filed challenging the Order Dated 15.5.2004 passed in Probate. Misc. Case No. 5 of 2003 by the Learned Civil Judge (Senior Division), Bhubaneswar.

2. The Petitioner in the said Probate Misc. Case is the Appellant before this Court. She filed the said case for probate of a Will u/s 276 of the Indian Succession Act. The case of the Petitioner was that the residential house site over plot No. 3 in Unit-III, Bhubaneswar City having an area of Ac.0.500 decimals belongs to late Rama Chandra Kar, S/o. Late Banchhanidhi Kar of Dargha Bazar, Cuttack. The said Rama Chandra Kar died on 5.3.1996 at S.C.B. Medical College & Hospital, Cuttack. Before his death, he executed his last Will & testament in favour of the Petitioner on 14.11.1995 in presence of the witnesses. Initially, no Opp. Parties were impleaded in the said Probate Misc. Case. But subsequently, by an order passed by the Learned District Judge, Khurda at Bhubaneswar on 5.7.1999, one Smt. Bisakha Kar, the State of Orissa through the Secretary, G.A. Department & the Director of Estates, Government of Orissa, G.A. Department were added as Opp. Parties in the said Probate Misc. Case. When the matter was pending before the Court below, a finding has been recorded in the impugned order that in spite of sufficiency of service of notice, the Opp. Parties, who were arrayed as parties, did not appear in the said case, except the State of Orissa. The Learned Court below, while ultimately dismissing the Probate Misc. Case, in the impugned order

has made certain observations & arrived at certain findings, as stated herein below:

(i) The Will is an unregistered Will even though the testator beneficiary & the witnesses went to the Sub-Registrar Office for the execution of the Will on 11.11.1995, no explanation is given as to why the Will was not registered.

(ii) In the initial stage of the case, the application for probate was tiled without impleading Bisakha Kar & the State Government as parties.

(iii) That the beneficiary & the attesting witnesses who are examined as & P.W.1, P.W.2 & P.W. 3 respectively, could not say the name of the typist who typed the Will & they also could not say who filled up the blank space in page 3 of the Will.

(iv) All the P.Ws admitted that the testator has one daughter, namely, Bisakha Kar as the only legal heir to succeed to the property of the testator, & the consent of Bisakha Kar has not been obtained in the Will.

(v) The intention of the testator is not explained for executing the Will in favour of a complete outsider while there is a legal heir to succeed to the whole property of the testator. Such a situation is highly Suspicious.

(vi) No relations or any independent advisor of the testator were present at the time of execution of the Will.

(vii) The witnesses to the Will are not related to the testator & they have no previous acquaintance with the testator. The witnesses are picked up

(viii) While the P.W. No. 2 in the cross-examination by the State stated that he came to the residence of P.W.1 where he found the testator, the P.W. 3 & the Doctor were there & they all came to Okil Khana, the P.W.3 stated in the cross-examination by the State that he came directly to Okil Khana.

(ix) P.W. 2 has stated in the cross-examination by the State that the Doctor - D.C. Pantia examined the testator & found him in good health & in sound mind & gave a certificate. The said certificate was not produced in the Court nor was the doctor examined.

(x) In the Court of the Civil Judge (Sr. Division), Cuttack, a Civil Suit bearing T.S. No. 32 of 1978 involving the suit property is pending.

(xi) Though the witnesses for the Plaintiff have stated that the testator was in sound health & sound mind, he died after four months of the execution of the Will. Each of the above observations & findings have been challenged in the appeal.

3. During the course of hearing of the appeal, Learned Counsel for the State submits that the property under the Will belongs to the State of Orissa. However, the State has not raised any Objection with regard to the genuinity of the Will which it also could not have objected to.

4. Mr. S.P. Mishra, Learned Counsel for the Appellant submits that the Learned Court below has acted contrary to law in arriving at the aforesaid findings & dismissing the Probate Misc. Case. Relying upon the decision in the case of Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others, , he submits that just because the Will is not registered, the Court cannot raise a suspicion for not accepting the Will as genuine inasmuch as a Will is not compulsorily registerable. He further submits that non-impletion of Smt. Bisakha Kar & the State of Orissa cannot be taken to be an adverse situation against the Petitioner-Appellant as the Petitioner-Appellant was ignorant about Smt. Bisakha Kar & the State of Orissa was not a necessary party to the Probate Misc. Case as in a probate proceeding, the Court is only to consider a valid execution of the Will & the Probate Court lacks jurisdiction to decide valid title of the testator/testatrix over the properties bequeathed under the Will by granting a letter of administration. In support of the above contention, he relies upon the decision in the case of Ishwardeo Narain Singh (supra) & the decision In the case of Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, . With regard to the suspicious ground as mentioned by the Court below in the impugned Judgment, which is noted in (iii) above, Mr. Mishra submits that the same cannot be accepted as a suspicious ground for not declaring the Will to be genuine. The Will was executed in the year 1995 & the witnesses were examined in the year 2004. Hence, even if, P.W. 3 could not say as to who filled up the blank space at page 3 of the Will, P.W.2 has stated that he filled up the blank space in the Will. Even though in the cross-examination, he could not say as to who filled up the blank space, the blank space in the Will, according to Mr. Mishra, was with regard to the name & address of the witnesses &, as such, the same cannot be a suspicious ground. With regard to the suspicion raised in point No. (iv), Mr. Mishra submits that law is well settled that the property, if self-acquired, can be bequeathed under a Will when the testator has been neglected by his kith & kin which also includes his daughter & son-in-law. Such intention could have been gathered in view of the fact of execution of the Will. With regard to point No. (v), he submits that for gathering the intention of the testator for executing the Will, the Court should have looked at the Will, which clearly shows the intention for its execution. When all the P.Ws have categorically stated in their evidence that the testator was in sound health & sound mind, the Learned Court not have drawn an adverse inference for non-filing of the doctor's certificate. The finding of the Court below that the witnesses are strangers cannot be accepted as a ground to disbelieve as it is not legally required that a witness to a Will should be related to the testator, more so, in the instant case, when it is evident from the Will itself that the testator was neglected by all his kith & kin. Further, Mr. Mishra submits that none of the witnesses stated that they had no acquaintance with the testator & nothing was put to them in the cross-examination in this regard. The discrepancies as noted by the Learned Court below, according to Mr. Mishra, are bound to appear in view of the long gap between the date of execution of the Will & the date of examination of the witnesses inasmuch as the said discrepancies are minor in nature. The finding of

the Court below with regard to non-examination of the doctor & non filing of his certificate is also not sustainable as no question was put to any of the witnesses, whether the doctor was alive or dead & even, no question was put as to whether a certificate was granted by the doctor, & his certificate exists on the Will. Further, a death certificate has been produced before this Court along with an application under Order 41, Rule 27 C.P.C. for accepting the same as additional evidence showing that the said doctor has died on 16.5.2003, i.e., much prior to the hearing of the Probate Misc. Case. The slid document is accepted as additional evidence by this Court for just adjudication of the matter & this Court finds that the said doctor being dead by the time, the case was taken up for hearing & no question having been put to the witnesses with regard to this aspect of the case, the finding of the Learned Court below in that regard is totally based on surmises & conjectures. The civil suit referred to by the Learned Court below was also dismissed &, therefore, just because a suit was filed in respect of the properties under the Will cannot be a ground to disbelieve the Will. Smt. Bisakha Kar having failed to appear before the Court below & the suit which was filed having already been dismissed, the Learned Court below could not have made a suggestion in the order that the Petitioner-Appellant be impleaded as a party in the said suit or to file a suit for declaration of title & possession in respect of the property in question. Mr. Mishra further submits that the death of the testator after four months of the execution of the Will cannot be a ground for raising a suspicion when it has been clearly established that at the time of execution of the Will, the testator was in sound health & sound mind.

5. In the case of Ishwardeo Narain Singh (supra), while analyzing the facts of the said case, it was observed that there is nothing in law which requires the registration of a Will & Wills are in a majority of cases not registered at all. The Supreme Court held that to draw any inference against the genuineness of the Will on the ground of its non-registration is wholly unwarranted.

In the case of Rabindra Nath Mukherjee and Anr. (supra), considering as to whether depriving natural heirs from succeeding to a property by execution of a Will, it was observed by the Supreme Court that this should not raise any suspicion, because the whole idea behind execution of Will is to interfere with the normal line of succession & so, natural heirs would be debarred in every case of Will; of course, it may be that in some cases they are fully debarred & in other only partially. In the instant case, there are materials appearing on the face of the Will that the testator was neglected by all his kith & kin which by implication includes his daughter also. It is, therefore, more fortified that no suspicious circumstances can be presumed as because, the testator had only one daughter who was debarred by execution of the Will. It is well settled in law that the mode of proving the Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will in Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder & in the absence of suspicious circumstances, surrounding the execution of the Will, proof of testatamentary capacity & the

signature of the testator as required by law is sufficient to discharge the onus. See H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, & Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, .

In a Five Judges Bench decision in the case of Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, with regard to appreciation of evidence of attesting witnesses to a Will, the Supreme Court held that where the evidence of both the witnesses to the Will is that the Will was executed in the afternoon on the date on which it purported to have been executed, a slight discrepancy in the evidence of these witnesses as to the time, when the Will was executed is not so serious as to destroy the value of their evidence especially when the witnesses were giving evidence after 8 or 9 years after the execution of the Will. The said circumstance of that case clearly applies to the facts of the present case, where the evidence has been led similarly after about 8 to 9 years from the date of execution of the Will. The Supreme Court in the said decision has further held that the attesting witnesses to a Will happened to be chance witnesses is no ground for disbelieving their evidence & it may be that it is more usual for witnesses to be called when a person is intending to execute a Will; even so, there is nothing impossible in advantage being taken of the accidental presence of witnesses in this connection. In the present case, the Learned Trial Court has also acted without jurisdiction in entering into the question of title over the properties, which have been bequeathed under the Will, as a Court in which a "Will" is sought to be probated has no jurisdiction to examine the question of title to the property under the Will.

6. Analyzing the facts of the present case in the touchstone of the ratio of the aforesaid case laws, it would be amply clear that the Learned Court below has committed an error of law in arriving at the findings as quoted above. The impugned Judgment, therefore, is not sustainable & this Court on analyzing the materials available on record finds that the Will is a genuine one; there is no suspicious circumstance concerning the execution of the Will; the testator executed the Will while in sound health & mind & the Will is the last Will of the testator.

7. In the circumstances, therefore, while setting aside the impugned Judgment on the findings as above, this Court directs that the Will be probated & required letter of administration be issued in favour of the Appellant.

The appeal is accordingly allowed.