

(2003) 06 OHC CK 0055
In the Orissa High Court
Case No : Misc. Appeal No. 104 of 1997

Sri Bhartruhari Mahatab

APPELLANT

Vs

Sri Dolagovinda Pradhan and Others

RESPONDENT

Date of Decision : 20-06-2003

Acts Referred:

Succession Act, 1925 — Section 276

Citation : AIR 2003 Ori 212 : (2003) 96 CLT 254 : (2003) 2 OLR 173

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

Bench : Single Bench

Advocate : A. Swain, G. Rath and B.R. Sarangi, for the Appellant; B. Pal, P.C. Panda, A.K. Misra and S.K. Ojha for R. Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

A.K. Patnaik, J.—This is an appeal u/s 299 of the Indian Succession Act, 1925.

2. The relevant facts briefly are that the appellant filed a petition u/s 276 of the Indian Succession Act, 1925 (hereinafter referred to as "the Act") for Letters of Administration in the court of the learned District Judge, Cuttack, which was registered as Misc. Case No. 14 of 1987. In the said petition, the appellant claimed that he is the adopted son of late Dr. Harekrushna Mahatab who executed a Will in April, 1960 bequeathing all his properties in favour of the appellant and Dr. Harekrushna Mahatab died on 2.1.1987. Along with the petition the appellant filed an affidavit annexing thereto a list of all the properties of the deceased Harekrushna Mahatab and item No. (iv) of the said list annexed to the affidavit comprised of a property located on Ac. 0. 520 decimals of land out of Plot No. 1160 in Khata No. 683 in Mouza Ramagarh in Cuttack town. Notices were issued by the learned District Judge along with general and special citations. The near relations of the deceased Dr. Harekrushna Mahatab named in the application did not file any objection. But respondent Nos. 1 and 2 intervened and filed separate objections contending that the aforesaid property in Cuttack town under item No. (iv) of the list filed along with the affidavit of the appellant

did not belong to deceased Dr. Harekrushna Mahatab and instead belongs to the Prajatantra Prachar Samiti. In view of the said contention raised by respondent Nos. 1 and 2, the proceedings for Letters of Administration were converted into a regular suit numbered as O.S. No. 48 of 1989 and tried by the learned Civil Judge (Senior Division), Ist Court, Cuttack, in accordance with the provisions of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code". In the said O.S. No. 48 of 1989, the learned Civil Judge (Senior Division) framed four issues as detailed herein below :

"1. Is the suit maintainable ?

2. Is the Will genuine and valid in law ?

3. Was the property in item No. iv of the Annexure - A (immovable) the personal property of Dr. H. K. Mahatab at the time of his death or the same belongs to Prajatantra prachar samiti ?

4. Is the plaintiff entitled to the grant of letters of administration in respect of the properties described in Annexure "A" of the petition?"

Thereafter, the appellant and respondents adduced their respective evidence and the learned Civil Judge (Senior Division) by judgment dated 2.12.1996 held on issue No. 1 that the suit was maintainable, on issue No. 2 that the Will was genuine and valid in law, on issue No. 3 that the Cuttack property in item No. (iv) was not the personal property of Dr. Harekrushna Mahatab at the time of his death but was the property of the Prajatantra Prachar Samiti and on issue No. 4 that the appellant was entitled to grant of Letters of Administration in respect of the properties mentioned in the list annexed to the petition of the appellant except the Cuttack property described under item No. (iv) of the said list annexed to the petition of the appellant. The learned Civil Judge (Senior Division) accordingly passed an order that Letters of Administration be granted in favour of the appellant in respect of the properties mentioned in the list annexed to the petition except the Cuttack property described under item No. (iv) of the said list. Aggrieved by the said judgment and order of the learned Civil Judge (Senior Division) in so far as it records a finding under issue No. 3 that the Cuttack property under item No. (iv) of the list annexed to the petition is not the personal property of Dr. Harekrushna Mahatab but is the property of Prajatantra Prachar Samiti, the appellant has filed this misc. appeal.

3. The Stamp Reporter made a report that the court-fee of Rs. 12/- paid on the memorandum of appeal was not sufficient and that the misc. appeal was not maintainable and instead a First Appeal was available against the impugned judgment and order of the learned Civil Judge. On 13.3. 1997, this Court admitted the appeal subject to the condition that the question of maintainability of the appeal raised by the Stamp Reporter shall be considered after appearance of the respondents. In response to the notices issued by this Court in this appeal, respondent Nos. 1 and 2 initially appeared through their counsel Mr. B. K. Pal but thereafter Mr. B. K. Pal withdrew his appearance. On 17.4.2003 when the appeal

was taken up for hearing, Mr. Pal produced before the Court a copy of/his letter dated 26th of February, 2003 addressed to Shri Prabhas Chandra Das, Advocate who had entrusted the case to him on behalf of respondent Nos. 1 and 2 from which it appeared that copies of the letter had also been marked to respondent Nos. 1 and 2. Receipts of Postal Department showing dispatch of copies of said letter to respondent Nos. 1 and 2 were also produced before the Court. A. D. cards acknowledging receipt of the said letter on 11.3.2003 and 10.3.2003 by respondent Nos. 1 and 2 were also produced before the Court. In the said letter dated 26th of February, 2003, Mr. Pal had intimated respondent Nos. 1 and 2 about withdrawal of his appearance from the appeal and yet respondent Nos. 1 and 2 had not taken steps to engage another advocate in the appeal. In the circumstances, on 17.4.2003, the Court heard Mr. G. Rath, learned counsel for the appellant and Mr. A. Swain, learned counsel appearing for the applicant - intervenor who had filed Misc. Case No. 1466 of 2002 for intervention.

4. Mr. G. Rath, learned counsel for the appellant, submitted that this appeal is against an order passed on a petition u/s 276 of the Act and not against a decree passed in a civil suit. He explained that the petition had been converted into a regular suit and tried as a regular suit in accordance with the provisions of the Code after the respondents contended in their objections to the petition u/s 276 of the Act that the Cuttack property under item No. (iv) of the list filed along with the petition of the appellant did not belong to Dr. Harekrushna Mahatab. He submitted that such conversion into a regular suit and trial as a regular suit was only for the purpose of adopting the procedure of a suit as would be clear from Section 295 of the Act and that the impugned judgment and order of the learned Civil Judge (Senior Division) was not really a decree in a regular suit. He submitted that the appeal against the impugned judgment and order of the learned Civil Judge was required to be registered as a miscellaneous appeal and not as a first appeal and the court-fee payable thereon was not to be determined on the basis of the valuation of the suit as in the case of the first appeal but was a fixed amount that was payable on the memorandum of appeal in a miscellaneous appeal. In support of this submission, Mr. Rath relied on the decisions of this Court in *Mst. Puinbasi Majhiani Vs. Shiba Bhue and Another*, and *M. Jagadiswar Rao and others Vs. Pratibasini Mohanty and others*, the decision of the Full Bench of Allahabad High Court in *Mrs. Panzy Fernandas Vs. Mrs. M.F. Queoros and Others*, and the decision of a Division Bench of Patna High Court in *Sidhnath Bharti (Objector) Vs. Jai Narayan Bharti* .

5. On a perusal of the said decisions cited by Mr. Rath, learned counsel for the appellant, I find that the law is now well settled that an order passed on a petition u/s 276 of the Act is not a decree and when a petition u/s 276 of the Act is converted into a regular suit and tried as a regular suit in accordance with the provisions of the Code in a case where a contention is raised opposing the prayer for issue of Probate or Letters of Administration; such conversion into a suit and trial in accordance with the provisions of the Code is a matter of procedure and the judgment and order passed in such a suit is not a decree but an order on a

petition u/s 276 of the Act. Accordingly, the appeal against such judgment and order is to be registered as a misc. appeal and the court-fee that is payable on the memorandum of the appeal is not to be determined on the basis of the valuation of the suit and instead would be a fixed amount as is payable on the memorandum of appeal in a misc. appeal.

6. Mr. Rath next submitted that the land relating to the Cuttack property under item No. (iv) of the list annexed to the petition u/s 276 of the Act was transferred to Dr. Harekrushna Mahatab by Late Motilal Pandit by a registered gift deed dated 2.10.1955 (Ext. 2) and a plain reading of the said Ext. 2 would show that the property was transferred to Dr. Harekrushna Mahatab personally. Hence, the said Cuttack property belongs to Dr. Harekrushna Mahatab and not to Prajatantra Prachar Samiti. He submitted that it is also well settled that in proceedings for grant of Probate or Letters of Administration, questions of title are not decided and the Probate Court is only concerned as to whether the Will of the deceased was duly executed and attested in accordance with law. Mr. Rath cited a decision of the Division Bench of this Court in *Laxmi Dei v. A. Chandravati* 78 (1994) CLT 370, for this well settled proposition of law. He submitted that in view of the aforesaid settled position of law, it was not within the jurisdiction of the learned Civil Judge (Senior Division) to record a finding in the impugned judgment and order under issue No. 3 that the cuttack property under item. No. (iv) of the list annexed to the petition of the appellant u/s 276 of the Act was not the personal property of Dr. Harekrushna Mahatab but was the property of the Prajatantra Prachar Samiti. He further submitted that similarly the direction in the operative portion of the impugned judgment and order that the Letters of Administration be issued in favour of the appellant in respect of all properties mentioned in the list annexed to the petition "except the Cuttack property described under item No. (iv) thereof" should be modified so as to delete the words "except the Cuttack property as described under item No. (iv) thereof".

7. Mr. A. Swain, learned counsel appearing for the intervenor, on the other hand, submitted that the land was a khasmal land of which the Government was a lessor and the evidence and documents filed before the learned Civil Judge would clearly show that the lessee was not Dr. Harekrushna Mahatab but the Prajatantra Prachar Samiti. He submitted that the findings of the learned Civil Judge in the impugned judgment and order that the aforesaid Cuttack property under item No. (iv) of the list annexed to the petition filed by the appellant u/s 276 of the Act belongs to the Prajatantra Prachar Samiti and not to Dr. Harekrushna Mahatab is therefore correct.

8. The Supreme Court has held in *Mrs. Hem Nolini Judah* (since deceased) and after her legal representative *Mrs. Hem Nolini Judah* (since deceased) and after her Legal Representative *Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others*, that questions of title are not decided in proceedings for grant of Probate or Letters of Administration. Following the, said decision of the Supreme Court, a learned single Judge of this Court has held in *Jagojoti Bose and Another*

Vs. Bararuchi Bose and Others, that Probate or Letters of Administration are not concerned with title to property but are concerned with the due execution of the Will. The aforesaid decision of the Supreme Court and the decision of the learned single Judge of this Court have been taken note of by a Division Bench of this Court in *Laxmi Dei v. A. Chandravati* (supra) and it has been held therein that the contention of the defendant claiming title in respect of half of the property covered under the Will cannot be entertained in an appeal which arises out of proceedings for grant of Letters of Administration. In the said case of *Laxmi Dei v. A. Chandravati*, the Division Bench of this Court has further held that once a finding is recorded that the Will has been duly executed and attested, the application made by the plaintiff for grant of Letters of Administration has to succeed. In view of the aforesaid clear law laid down by the Apex Court and by a Division Bench of this Court that in proceedings for Letters of Administration questions of title are not relevant and the only question that has to be decided is whether the Will has been duly executed, the learned Civil Judge (Senior Division) ought not to have framed and tried issue No. 3 as to whether the Cuttack property in item No. (iv) of the list annexed to the petition u/s 276 of the Act filed by the appellant was the property of Dr. Harekrushna Mahatab at the time of his death or of the Prajatantra Prachar Samiti nor should he have recorded a finding on the said issue No. 3, and once he recorded a finding under issue No. 2 that the Will of Dr. Harekrushna Mahatab was duly executed and attested and was genuine and valid in law, Letters of Administration had to be granted in favour of the appellant in respect of the properties of the deceased Dr. Harekrushna Mahatab.

9. For the aforesaid reasons, the findings of the Civil Judge (Senior Division) in the impugned judgment and order under issue No. 3 are deleted and it is ordered that Letters of Administration be granted in favour of the plaintiff-appellant in respect of the properties of late Dr. Harekrushna Mahatab. The operative portion of the impugned judgment of the learned Civil Judge is modified in terms of the aforesaid order and the appeal is allowed to the extent indicated above. It is made clear that the question of title to the Cuttack property described under item No. (iv) of the list annexed to the petition of the appellant u/s 276 of the Act is left open to be decided in a separate suit.

Considering however the facts and circumstances of the case, parties shall bear their own costs.