

GAHC010229002021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Review.Pet./2/2022

EMAN @ EMON DUTTA
D/O- SRI SUMAN DUTTA, R/O- S.C. GOSWAMI ROAD, PAN BAZAR, GHY-1,
DIST.- KAMRUP, ASSAM

VERSUS

HIMANGSHU DUTTA AND ANR.
S/O- LATE NABIN CH. DUTTA, R/O- S.C. GOSWAMI ROAD, PAN BAZAR,
GHY-1, DIST.- KAMRUP, ASSAM

2:SUMAN DUTTA
S/O- LATE NABIN CH. DUTTA
R/O- S.C. GOSWAMI ROAD
PAN BAZAR
GHY-1
DIST.- KAMRUP
ASSAM-781001

Advocate for the Petitioner : MR. D MOZUMDER

Advocate for the Respondent : MR. A SATTAR (R-1)

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 22-03-2023

Heard Mr. D. Mozumder, learned senior counsel assisted by Mr. P. Bora,

learned counsel for the petitioner as well as Mr. Z. Mukit, learned counsel for the respondent no.1. None appears on call for the respondent no.2 although notice on the said respondent is deemed to be served.

2. This review petition under Order XLVII Rule 1 read with section 114 CPC is directed against the judgment and order dated 13.03.2020 passed by this Court in CRP (I/O) 396/2017, thereby allowing the said revision filed under Article 227 of the Constitution of India.

3. The review petitioner is the plaintiff in the probate title suit pending for disposal before the Court of learned District Judge, Kamrup (Metro). The pleadings before the learned trial Court is not relevant for the purpose of adjudication of this review petition and therefore, the same has not been referred to in this order. It would suffice to mention that the petitioner claims that the testatrix, namely, Sewali Dutta (since deceased) had executed her last will dated 09.04.2008 and thereby bequeathed the ground floor of her multistoried building, consisting of 5 (five) floors to the review petitioner. The testatrix, who died on 10.07.2009, had left behind the respondent no. 1 and the proforma respondent no.2, being her two sons and the petitioner is the daughter of the proforma respondent no. 2. The petitioner had approached the learned Court of District Judge, Guwahati by filing a probate petition under section 276 of the Succession Act, 1925 which was registered as Misc. Probate Case No. 14/2014. On contest by the respondent no. 1, the said proceedings was re-registered as Probate T.S. No.1/2015.

4. In course of the trial of the probate suit, the petitioner along with P.W. nos. 2 and 3, had filed their respective evidence-on- affidavit and they

were cross-examined and discharged. Thereafter, the respondent no.1 had filed his evidence on affidavit. On 05.05.2017, the petitioner had filed a petition under section 151 CPC, which was numbered as petition no. 734/2017, containing a prayer to allow the petitioner to file additional evidence-on-affidavit of the PW-2 and PW-3 to exhibit the last will dated 09.04.2008 of the testatrix to prove the same.

5. The learned District Judge had allowed the said petition no. 734/2017 by order dated 25.09.2017, at a cost of Rs.2000/- and it was provided that the additional affidavits would be filed in respect of both the PW nos. 2 and 3 on 15.11.2017, failing which no further date would be given. Aggrieved by the said order dated 25.09.2017, the respondent no.1 had assailed the same by approaching this Court under Article 227 of the Constitution of India, which was registered as CRP (I/O) 396/2017. This Court by order dated 13.03.2020, recorded that as none had appeared on call for the respondents in CRP (I/O) 396/2017, i.e. the petitioner and proforma respondent no. 2 herein, allowed the said revision by setting aside and quashing the order dated 25.09.2017, passed by the learned District Judge, Guwahati in Probate T.S. No. 1/2015 by also providing therein that if any affidavit was filed by the PW-2 and PW-3, the same would be treated as expunged.

6. The petitioner, being aggrieved by the said order dated 13.03.2020 passed in CRP (I/O) 396/2017, had approached the Supreme Court of India by filing Petition for Special Leave to Appeal (C) No(s). 20040/2021, whereby the following order was passed on 11.12.2021:-

“Learned counsel for the petitioner submits that he was not served with the

notice in the revision petition and since he was treated as served, the impugned order has been passed in the absence of the counsel for the petitioner.

He further submits that all that the trial Court did was to permit the petitioner to give a mark to the signature where the testimony of testator had signed as the attesting witnesses had already supported the execution of the Will, the deficiency being only stated to be an error of the counsel.

In view of the aforesaid, after some arguments, we permit the petitioner to withdraw the present Special Leave Petition to file an application within three weeks before the High Court pointing out both the aforesaid circumstances seeking recall of the impugned order.

The Special Leave Petition is dismissed as withdrawn with the aforesaid liberty."

7. Thereafter, the present review petition has been filed on 28.12.2021. The learned senior counsel for the petitioner has submitted that the PW nos. 2 and 3 had deposed in their evidence- on- affidavit that the testatrix had executed a *Will* in their presence, which was in consonance with the provisions of section 63(3) of the Succession Act, 1925. However, the omission on the part of the then learned counsel for the petitioner had not exhibited the signature of the testatrix. It is submitted that although the evidence of the PW nos. 2 and 3 to the effect that the testatrix had executed her *Will* in their presence could not be demolished during the cross-examination of the said two witnesses. It has been submitted that the procedural part of marking a document and signature as exhibit is required to be done by the then engaged counsel for the petitioner, but due to the ignorance and/or negligence of the then learned counsel of the petitioner, because of the absence of the *Will* being proved along with the signatures, the purpose of giving evidence-on- affidavit by the witnesses, i.e. PW-2 and PW-3 was not achieved. It is submitted that it is a well settled legal proposition that the Court of law must honour the last wish of the testatrix and the same should be given due weightage and to emphasis

the said point reliance has been placed on the case of (i) *Rabindra Nath Mukherjee & Anr. v. Panchanan Banerjee (Dead) by LRs & Ors.*, (1995) 4 SCC 459 (para 1, 4 to 8), and (ii) *Sudhir Kumar Sen v. Bijoy Kumar Sen*, FA No. 210/1996 decided by Calcutta High Court on 18.03.2009 and reported in (2009) 0 Supreme(Cal) 232 (para-2). It is submitted that in the case of *Bant Singh & Ors. v. Didar Singh & Ors.*, 2017 SCC OnLine P&H 3483 (para-15), the High Court of Punjab and Haryana had held that "A registered Will executed by the testator is a solemn document. The Courts are required to make an attempt to give effect to the wish of the testator, who is no more in the world."

8. In support of his contention that recourse to the provision of section 151 CPC is permissible to deal with any particular procedural aspect which is not provided expressly or impliedly in the Code of Civil Procedure, the learned senior counsel for the petitioner has placed reliance on the case of *K.K. Velusamy vs. N. Palanisamy*, (2011) 11 SCC 275 (para 9, 11, 19 and 22), which is reiterated in the case of *Gayathri v. M. Girish*, (2016) 14 SCC 142.

9. It has been submitted that at the time when the petitioner had approached the Supreme Court of India by filing Petition for Special Leave to Appeal (C) No(s). 20040/2021, the petitioner was not aware that the notice was served on her through her father i.e. proforma respondent no.2. In the said context, it is submitted that in this review petition, it has been explained that although the father of the petitioner had received the notice, but being a senior citizen, had failed to hand over the same to the petitioner. It is submitted at the Bar by the learned senior counsel for the petitioner that the proforma respondent no.2 is now 74 years of age.

10. It has also been submitted that the Court is required to firstly consider whether the application by the petitioner for filing additional evidence-on-affidavit by the PW nos. 2 and 3 was bona fide and in the interest of justice, and secondly it is required to be considered as to whether by allowing additional evidence to come on record, the same would assist the Court in deciding the issue after getting clarification from the PW nos. 2 and 3.

11. It is once again empathetically submitted that the marking of a document as exhibit and to mark the signature of the testatrix as exhibit is purely the job of the counsel engaged for trial of a suit and that the petitioner is not expected to know the procedural Court practice. Hence, it is submitted that in this case the then conducting counsel had committed a mistake of not marking the will as well as the signature of the assisting witnesses i.e. the PW-2 and PW-3 as exhibits although the original *Will* had been produced before the learned trial Court and the said original *Will* was ordered to be kept in safe custody vide order dated 06.02.2017. Accordingly, it is submitted that the purpose of filing the petition for additional evidence was neither frivolous nor to fill up the lacuna but to rectify the negligence of their learned counsel, by whose omission, the *Will* of the testatrix and signatures contained therein was not exhibited and similarly, the signatures of the attesting witnesses i.e. PW-2 and PW-3 were not exhibited.

12. Per contra, by referring to the case of *Parsion Devi & Ors. v. Sumitri Devi & Ors.*, (1997) 8 SCC 715 (para 9 & 10), the learned counsel for the respondent no.1 has submitted that unless it can be shown that the present

review application is within the scope of the prescription of the provisions of Order XLVII, Rule 1 and section 151 CPC, by demonstrating that there was a mistake or error apparent on the face of record, which can be found out without lengthy argument, this review petition would not be maintainable. It is submitted that from the nature of submissions made by the learned senior counsel for the petitioner, it is apparent that the present case falls within the domain of an erroneous decision, which cannot be and/or ought not to be corrected in exercise of review jurisdiction, but the only remedy that may be available to the petitioner is to file an appeal.

13. It is further submitted that from the perusal of the order dated 11.12.2021, passed by the Supreme Court of India in Petition for Special Leave to Appeal (C) No.20040/2021, it appears that two-fold submissions made by the learned counsel for the petitioner before the Supreme Court of India was - (a) *"He further submits that all that the trial Court did was to permit the petitioner to give a mark to the signature where the testator had signed as the testimony of attesting witnesses had already supported the execution of the Will"*, and that (b) *"the deficiency being stated to be an error of the counsel."*

14. In respect of both the aforesaid contentions of the petitioner before the Supreme Court of India, it is submitted that both the said stand of the petitioner before the Supreme Court of India was palpably incorrect and misleading, and are not sustainable on facts. It is submitted that both the points taken by the petitioner before the Supreme Court of India, as recorded in the order dated 11.12.2021, are not sustainable on facts because as per the contents of the evidence- on- affidavit of the PW-2 filed before the learned trial

Court, it has been specifically stated in sub-paragraph to para-4 thereof that “A copy of the will dated 09.04.2008 is marked as Exhibit-1. Exhibit-1(i) is the signature of Sri Pradip Barman, Exhibit-I(ii) is the signature of Jhelum Rajkhowa.” Moreover, in para 3 of the evidence-on-affidavit of PW-2, it has been stated “That, the Testator Late Sewali Dutta had executed a WILL dated 09.04.2018 which is the last WILL in respect of the Schedule property as described in the said WILL dated 09.04.2008, in sound mind and good health and by the said WILL Sewali Dutta bequeathed the Schedule property in favour of her grand-daughter/ petitioner and appointed the petitioner as sole executrix of the WILL dated 09.04.2008 in my presence. Exhibit-I(i) is my signature.” Moreover, the prayer made in petition no.734/2017 dated 05.05.2017, is to the following effect- “It is therefore prayed that your Honour would be pleased to allow this application under inherent power of this Hon’ble Court and thereby allow the Petitioner/ Plaintiff to file additional evidence through PW-2 & PW-3 to exhibit the Last Will, Dated 9.4.2008 executed by Late Sewali Dutta to prove the same and be pleased to pass such further or other order as your Honour think fit and proper” Thus, the prayer in petition no. 734/2017 is to allow the petitioner to file additional evidence through PW-2 and PW-3 to exhibit the purported last Will dated 09.04.2008 of the testatrix to prove the same.

15. Hence, it is submitted by the learned counsel for the petitioner, that in light of the contents of the petition no. 734/2017, it is clear that the petitioner had not exhibited the purported Will of the testatrix. Therefore, it is submitted that the submissions made by the learned counsel for the petitioner before the Supreme Court of India, as recorded in its order dated 11.12.2021, is quite contrary to the contents of petition no. 734/2017.

16. It is submitted that unless the *Will* in original was exhibited by the petitioner (PW-1) or by the PW-2 and PW-3, it is not possible to allow such witnesses to "*give a mark to the signature where the testator had signed*". It is also submitted that an allegation that the learned counsel for the petitioner in the trial Court had committed a mistake, would not constitute a good ground for this Court to exercise power of review under Order XLVII, Rule 1 or under section 114 of the CPC. In this regard, it is submitted that it is not the case of the petitioner that her advocate had committed a mistake in conducting CRP (I/O) 396/2017. It is submitted that the learned senior counsel for the petitioner has not been able to point out what "error apparent on the face of record" was there in the impugned order dated 13.03.2020 passed by this Court in CRP (I/O) 396/2017.

17. Considered the submissions as well as cases cited by both sides. Also perused the LCR which had been called for.

18. In a review petition, the only consideration of the Court is whether any case has been made out for exercising review jurisdiction. In the said regard, it is seen that the petitioner has projected a case that notice on her was served on her father, who is 74 years of age and did not hand over the notice to the petitioner and therefore, she remained unrepresented when the proceedings of CRP (I/O) 396/2017. Thus, at this stage, the merit of the case need not be examined.

19. We have noticed that the petitioner and the respondents are

contesting the case since the year 2014, when probate petition was filed, as such, we are of the considered opinion that there was no reason for the petitioner herein not to contest the proceeding of CRP (I/O) 396/2017, when the matter was called, if she had the knowledge of the said proceeding. Moreso, when the review petitioner has approached the Supreme Court of India against the order dated 13.03.2020 passed by this Court in CRP (I/O) 396/2017, and has approached this Court again for review of the said order demonstrates that the petitioner is otherwise diligently pursuing the case, but for non-appearance in CRP (I/O) 396/2017, on the projected ground of no knowledge of the proceeding. Therefore, in the considered opinion of the Court, the explanation of the petitioner for her non-appearance when the proceeding of CRP (I/O) 396/2017 was taken up, is plausible and acceptable.

20. Therefore, the Court is inclined to recall the order dated 13.03.2020 passed by this Court in CRP (I/O) 396/2017, and the said proceeding is restored to file for a fresh contested hearing of the matter.

21. Accordingly, this review petition stands allowed by recalling the order dated 13.03.2020 passed by this Court in CRP (I/O) 396/2017. Resultantly, the proceeding of 13.03.2020 passed by this Court in CRP (I/O) 396/2017 is restored to file.

22. Once again it is clarified that the merit of the contention of the respective parties has not been gone into and examined, which is left to be considered when the CRP (I/O) 396/2017 would be taken up for hearing.

JUDGE

Comparing Assistant