

GAHC010258632023



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

Case No. : Test.Cas./3/2023

ANITA ROY
W/O NIMAI ROY,
RESIDENT OF LALGANESH, PO ODALBAKRA, PS FATASIL AMBARI, DIST.
KAMRUP (M), ASSAM 781034

VERSUS

JIBAN SUTRADHAR
S/O LATE ASWINI KUMAR SUTRADHAR, RESIDENT OF TELIAPATTY, T.P
ROAD, PO AND PS NAGAON SADAR

Advocate for the Petitioner : MR. SHEELADITYA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 11.12.2023

Heard Mr. Sheeladitya, learned counsel for the appellant.

2. By filing this appeal under Section 299 of the Indian Succession Act, 1925, the appellant has assailed the order dated 28.09.2023, passed by the learned Additional District Judge No.2, Nagaon in Misc. (Probate) Case No.

19/2019. By the impugned order, the prayer of the petitioner for production of the original will as well as other original documents were rejected on the ground that the same was not tenable in the eyes of law.

3. The learned counsel for the appellant has referred to the provisions of Section 276 of the Indian Succession Act to urge that along with a petition for probate, there is a legal requirement under Clause-(b) of Sub-Section (1) of Section 276 to annex with the probate application the writing, which is a last will and testament. It is submitted that the appellant, by filing petitions on 27.06.2022 and 15.06.2023 had prayed before the learned trial Court for a copy of the petition and other documents as mentioned therein. Both the petitions were put up for passing necessary orders on 18.09.2023 and the said learned Court, by the impugned order dated 18.09.2023, had rejected those petitions on the ground that the trial is required to be made, as merely as possible, as per the Civil Procedure Code and accordingly, it was held that the probate petition cannot be rejected under Order VII Rule 11 CPC. The learned trial Court had held that no objection was raised before filing of the written statement and the petition was filed belatedly and accordingly, petition no. 1408/2023 was dismissed with cost of Rs.1,000/- (Rupees one thousand only) against the appellant and moreover, the other petition, being petition no. 1772/2023 dated 24.07.2023 was also rejected.

4. The learned counsel for the appellant has submitted that the original will has not been produced and no reason has been assigned for not producing the original will along with the probate petition, and it was submitted that in absence of the original will, the appellant would not be able to effectively assail the said document and dispute the signatures contained therein.

5. It is also projected that the respondent has in his custody several

assets of the deceased, for which he has not rendered any accounts and he has allegedly usurped a large amount of money left behind by the deceased by converting the same for his own use. It has also been submitted that the petitioner had prayed for disclosures of document and information relating to all the 7 bank accounts of the deceased, post office accounts of the deceased, details of fixed deposits of the deceased, property details of the deceased (both movable and immovable), including assets in the furniture shop of the deceased, death certificate of the deceased and his elder son, details of the locker standing in the name of the deceased in the Indian Bank and it was projected that inspection of the said documents were essential before filing of the written statement/objection against the grant of probate. It was submitted that as it was insisted by the learned Court, although written objection was filed by the petitioner, but in the absence of the documents, effective defence could not be taken in the probate proceeding.

6. It transpires from the contents of the impugned order dated 18.09.2023 that the respondent, who is the petitioner in the probate petition had explained the reason as to why certified copy of the will had not been submitted with his petition and the original of the will was still in the custody of the registration office and not yet delivered to him. It was the case of the respondent that a photocopy of the certified copy of the will has been supplied to the appellant.

7. The projection made by the petitioner that the original will was not produced for which the probate petition is not maintainable cannot be made applicable in the present case in hand as there is distinctive situation in the present case. It is the case of the respondent, who is the petitioner in the probate proceeding that the original will is still lying with the Sub-Registry office.

Therefore, if the document is not delivered by the registration office, it would only be by the order of the Court that the Sub-Registrar's office shall produce the original will in the probate proceedings. The respondent, who is not having the custody of the original will cannot be compelled to do what is impossible. Therefore, in the present case in hand, there is a distinctive feature that the last will of the deceased is not available with the petitioner but lying in the Sub-Registrar's Office. Therefore, the Court is inclined to hold that non-production of the said original will cannot be said to be fatal in facts and circumstances of the present case. It is not the case of the appellant before this Court that along with the documents, the original registration receipt of the will was also produced by the respondent. Therefore, in this case, if the registration of the will was not done at the instance of the respondent and he is not a party to the execution or registration of the will, the registration receipt may not be available with the respondent and therefore, the Sub-Registry office shall not be obliged to hand over the original will to the respondent in the absence of registration receipt being produced before them, which is a condition precedent for handing over the original document by the Sub-Registrar's office.

8. Accordingly, under the distinguishing facts and circumstances of the present case, the Court is inclined to hold that the non-production of the original will in the present case in hand by the respondent cannot be faulted with. The photocopy of the certified copy of the will has been provided to the appellant, as submitted at the bar. Therefore, the Court does find that the application for grant of probate can be rejected under the provision of Order VII Rule 11 CPC.

9. Therefore, at best, on the production of the original will, if the appellant has any reason to question the execution of the said will, the

appellant may be well advised for appropriate recourse of law to assail the will on production of original will.

10. Insofar as the petition no. 1772/2023 dated 24.07.2023 is concerned, the learned counsel for the appellant has submitted that the said petition is annexed Annexure-D to this application. In the body of the said application, no prayer has been made by the appellant for production of the copy of the will. Therefore, the said petition is not at all material for a decision in this case as it does not relate to the prayer of the petitioner for production of the original will. Insofar as the prayer for discovery of information is concerned, which is contained in the said petition, the learned counsel for the appellant has not been able to show that under Chapter-IV of the Indian Succession Act, 1925, the concerned District Judge has any power, save and except Section 269 of the Indian Succession Act, for passing appropriate orders for protection of the property of the deceased person. Therefore, the learned counsel for the appellant has not been able to demonstrate that the learned District Judge, who is in *seisin* of the probate proceedings, is otherwise empowered to collect and part and/or provide such information to the appellant in course of the said probate proceedings.

11. Therefore, it appears that it is not the case of the appellant that the learned District Judge was called upon to interfere for protection of the property of the deceased. Therefore, the rejection of the prayer made in petition no. 1772/2023 dated 24.07.2023 is also not found to be perverse or unsustainable.

12. Therefore, in view of the discussions above, the Court is not inclined to admit this appeal for hearing or to issue notice to the respondent. Accordingly, this appeal stands dismissed at the initial stage without issuance of notice on

the respondent.

13. Before parting with the records, the Court is inclined to provide that nothing contained in this order shall prejudice the appellant when the probate proceedings are heard on merit, and the appellant shall be entitled to take all such defence, which he is so advised.

JUDGE

Comparing Assistant