

GAHC010184282007



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

Case No. : Test.Cas./2/2007

DIPTY BORTHAKUR
W/O DULENDRA NATH BARTHAKUR, D/O LT. ROMA KANTA SABHAPANDI,
DIGAMBAR CHUK, JORHAT.

VERSUS

ARUNA CHAKRABORTY and ORS
W/O LT. NANI KUMAR CHAKRABORTY.

2:SMT. ANTARA CHAKRABORTY

D/O LT. NANI KUMAR CHAKRABORTY
C/O ARUNA CHAKRABORTY
BOTH ARE RESIDENTS OF DIGAMBAR CHUK
JORHAT
PO. JORHAT
DIST. JORHAT

Advocate for the appellants : Mr. PS Deka
Senior Advocate
Ms. P Bhattacharjee

Advocate for the respondents : Ms. S Sarma

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER(ORAL)

Date: 23.07.2024

The instant appeal is filed under Section 299 of the Indian Succession Act, 1925 (for short, the Act of 1925) challenging the judgment dated 16.12.2006 passed in Title Suit (Probate) No.30/2001 by the learned District Judge, Jorhat.

2. At the outset, it is very relevant to take note of that the instant appeal was filed by two appellants. However, one appellant expired and accordingly her name was struck off vide an order passed by this Court on 24.08.2017.

3. The brief facts leading to the filing of the instant appeal are that one Roma Kanta Sarma Sabhapandit during his lifetime executed a will which was duly registered on 15.09.1990. In terms with the said will, the said Late Roma Kanta Sarma Sabhapandit (hereinafter to be referred to as the 'testator') had *bequeathed an Assam-typed house* bearing Jorhat Municipal Holding No.193, Ward No.1 of Jorhat Municipal Board, Jorhat consisting of 17 rooms, besides bathrooms, sanitary latrines, kitchen and Verandah along with a plot of land measuring 1 katha 19 ½ lechas covered by dag No.1225(old), 1391/2160 (new) included in PP No.204(old), 298(new) of Block No.6, Jorhat Town Mouza within the district of Jorhat with specific boundaries in favour of his two daughters, the appellants herein.

4. It is relevant to take note of that the said will was executed in presence of two attesting witnesses, one Sri Harendra Nath Sarma and the other Sri Tapan Borthakur. The said testator expired on 13.09.1995 at the age of 84 years. Pursuant thereto, a probate proceedings was initiated being Probate Case No.29/2000 seeking grant of probate in favour of the applicants, who are the appellants herein. In the said probate proceedings, the respondents herein were made parties.

5. At this stage, it is relevant to take note of that the respondents herein are the wife and the daughter of one Nani Kumar Chakraborty (since deceased), who is the brother of the appellants herein. The respondents upon appearing objected to the grant of probate by filing written objection by raising objection that the said will was executed under suspicious circumstances and the Assam-typed house which was a part of the property *bequeathed* in favour of the appellants was constructed by Late Nani Kumar Chakraborty during his lifetime. On the basis of the said objection so made, the said probate proceedings was converted into a suit which was registered and numbered as Title Suit (Probate) Case No.30/2001.

6. At this stage, it is very relevant to take note of that a perusal of the probate application reveals that the said probate application was filed and was duly verified by the two attesting witnesses, namely, Sri Harendra Nath Sarma and Sri Tapan Borthakur, who claimed to be present when the will, in question, was executed by the testator. On the basis of the objection so filed, four issues were framed in the form of points of determination which were:

(1). Whether the will (Exhibit-A) was duly executed by the testator Roma Kanta Sarma Sabhapandit in his good health and mental condition without any influence or duress under the petitioners?

(2). Whether the house standing on the land as included in the will, in question and described under the schedule of the Probate petition belonged to said Nani Chakraborty being the husband of the opposite party No.1 and the father of the opposite party No.2, which the opposite party No.1 owns after the death of her husband and after the death of the said testator being the father of deceased Nani Chakraborty?

(3). Whether the two lessas of the land included in the said will were acquired by the Government as per the order dated 09.07.1970 in the Land Acquisition Case No.109/08/69?

(4). Whether the petitioners are entitled to the grant of a probate of the said will?

7. On behalf of the appellants, who were the applicants to the said probate application, five witnesses were examined including the applicants. The other three witnesses included the two attesting witnesses and one LD Assistant of the Jorhat Sub-Registry Office.

8. On behalf of the respondents, there were three witnesses including the respondent No.1. It is, however, relevant to take note of that amongst the three witnesses, one witness did not turn up for the cross examination, who was Smti. Swarup Borthakur and as such her evidence was expunged.

9. The learned District Judge, Jorhat vide judgment dated 16.12.2006 disposed of the said proceedings. The point of determination No.1 was decided in favour of the appellants thereby holding that the will was executed voluntarily in good health and mental condition and without any influence or duress from the applicants.

10. In respect to the point of determination No.3, it was held that the said point of determination could not be decided in the affirmative on account of want of documentary proof. In other words, the point of determination as to whether the two lessas of land included in the will were acquired by the Government as per the order dated 09.07.1970 in Land Acquisition Case No.109/08/69 could not be proved.

11. The most pertinent point for determination was the point of determination No.2 in respect to which the learned District Judge, Jorhat decided the question of title as regards the house standing over the land, in question, or for that matter decided as to whether the testator had the competence to *bequeath the Assam-typed house in favour of the apeplants*.

12. The point for determination No.4 was decided partly in favour of the appellants thereby granting probate only in respect to the land and not the house.

13. Being aggrieved by the determination so made by the learned District Judge, Jorhat in its impugned judgment dated 16.12.2006 in respect to the

point of determination No.2., the instant appeal has been filed by the appellants before this Court.

14. In the backdrop of the above, the point of determination which arises for consideration is as to whether the learned District Judge, Jorhat was justified in deciding the question of title in respect to the Assam-typed house which was bequeathed by the registered will dated 15.09.1990 by the testator in favour of the appellants?

15. I have heard Mr. PS Deka, the learned senior counsel appearing on behalf of the appellants who submitted that the probate Court could not have gone into the question of title. The learned senior counsel further submitted that the duty of the probate Court is to ascertain as to whether the will was executed in accordance with law and as to whether the will was executed under suspicious circumstances. The learned senior counsel submitted that the question as to whether the Assam-typed house belonged to the testator and as to whether the testator had the authority to bequeath the Assam-typed house in favour of the appellants is a question to be decided by the competent Civil Court, if need be and not in a probate proceedings.

16. On the other hand, Ms. S Sarma, the learned counsel appearing on behalf of the respondents submitted that the testator vide the purported registered will dated 15.09.1990 could not have bequeathed the house, in question, as the same was constructed by the predecessor of the respondents Late Nani Kumar Chakraborty during his lifetime. She further submitted that the respondents are

presently in possession of the house, in question and, as such, the learned District Judge was justified in not granting the probate in respect to the house, in question. She further submitted that the will, in question, was executed under suspicious circumstances, inasmuch as, the testator, who was residing at a stone throw distance from the Registry Office did not go to the Registry Office and the will was executed by way of a Commission. She submitted that it was under undue influence that the will was executed.

17. This Court has duly heard the learned counsels appearing on behalf of the parties and perused the materials on record, including the evidence. A perusal of the will which has been registered on 15.09.1990, shows that the Assam-typed house as well as the land mentioned in the Schedule to the will have been bequeathed in favour of the appellants. The will was executed in presence of two witnesses, one Sri Harendra Nath Sarma and the other Sri Tapan Borthakur. When the application seeking probate was filed on 08.02.2020, the said application was duly supported by the verification made by two attesting witnesses. Subsequent thereto, when the application was amended in view of the objection so filed by the respondents, by filing an application on 20.05.2003, the said application was also verified by the two attesting witnesses.

18. This Court has also duly taken note of the evidence of the witnesses and more particularly, the evidence so tendered by both the attesting witnesses. Nothing could be taken out during the cross examination of the said attesting witnesses to show that the registered will dated 15.09.1990 was executed under suspicious circumstances. Therefore, the submissions made by Ms. S Sarma, the learned counsel appearing on behalf of the respondents to the effect that the

registered will dated 15.09.1990 was made under suspicious circumstances do not hold water.

19. The most important point for determination in the instant appeal is as to whether the learned probate Court was justified in entering into the question of title as regards the property which has been bequeathed. It is no longer res integra that the probate Court only certifies the execution of the will by the testator in accordance with law. The probate Court is not required to enter into the competing claims of the parties as regards the title of the properties bequeathed. It is only the Civil Court of competent jurisdiction which is empowered to decide, if a question duly arises as regards the right, title and interest over the properties, in question. Under such circumstances, it is the opinion of this Court that the learned probate Court was not justified in deciding the point No.2 and point No.4, thereby holding that the appellants herein would be only entitled to the land and not the house. The learned District Judge having already come to an opinion while deciding the point No.1 that the registered will dated 15.09.1990 was executed without any undue influence and in accordance with law ought not to have entered into the controversy as to whether the house belonged to the testator or his son (predecessor-in-interest of the respondents). Accordingly, this Court, therefore, interferes with the decision of the learned District Judge in the impugned judgment dated 16.12.2006 in so far as point No.2 and point No.4 and holds that the appellant herein would be entitled to the probate of the registered will dated 15.09.1990 as regards the property so bequeathed therein.

20. Accordingly, the instant appeal, therefore, stands disposed thereby

interfering as regards the point No.2 and the point No.4 to the impugned judgment dated 16.12.2006 in Title Suit (Probate) No.30/2001 and declaring that the appellant No.1 herein would be entitled to the probate of the registered will dated 15.09.1990 in respect to the properties so bequeathed therein.

21. This Court also further finds it very pertinent at this stage to clarify that this Court has not decided as regards the title of the property so bequeathed by the registered will dated 15.09.1990. Any of the parties having any issue as regards the right, title and interest over the property so bequeathed shall be at liberty to approach the appropriate Court wherein such questions can be decided.

22. This Court directs the Registry to forthwith return the LCR back to the Court of the learned District Judge, Jorhat and the learned District Judge, Jorhat shall issue necessary certificate as regards the grant of probate in accordance with the provisions of the Act of 1925.

JUDGE

Comparing Assistant