

GAHC030002132022



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

Case No. : RSA/2/2022

Zirliana
Tuikual South, Aizawl

VERSUS

K. Lalduhkima
Tuikual South, Aizawl

Advocate for the Petitioner : Mr A.R. Malhotra

Advocate for the Respondent : Mr Lalfakawma

BEFORE

HON'BLE MR. JUSTICE NELSON SAILO

Dates of hearing : **29.07.2024 & 01.08.2024**

Date of judgment : **13.08.2024**

JUDGMENT & ORDER (CAV)

Heard Mr. A.R. Malhotra, learned counsel for the appellant and Mr. Lalfakawma, learned counsel for the sole respondent.

[2.] This is a second appeal filed by the appellant under Section 17(2)(b) of

the Mizoram Civil Courts Act, 2005 read with Section 100 of the Code of Civil Procedure, 1908 (CPC) against the Judgment & Order dated 02.02.2021 passed by the Court of District Judge, Aizawl in RFA No. 26/2019 arising out of Probate Case No. 3/2015.

[3.] The appellant was the applicant in the probate case and the respondent was the opposite party/respondent.

[4.] Brief facts of the case essential for the disposal of the instant appeal is that Sh. K. Denghmingthanga, H/o Smt. Vanlalhliri, a permanent resident of Tuikual, Aizawl, Mizoram was the rightful owner of the land and building covered by LSC No. 738/1977 located at Tuikual 'A', Aizawl, Mizoram. He expired on 28.03.2013 and his wife Smt. Vanlalhliri obtained Heirship Certificate No. 654/2013 dated 16.04.2013 for the said property from the Court of Civil Judge-III, Aizawl. During her lifetime, Smt. Vanlalhliri made a Will on 15.08.2014 and the said Will was duly attested as per the provisions of the Mizo District (Inheritance of Property) Act, 1956 (Act of 1956).

[5.] Smt. Vanlalhliri expired on 02.12.2014 and after her death, the appellant who was named as the executor of the Will filed Probate Case No. 3/2015 before the Court of Civil Judge-V, Aizawl and the Court vide its Judgment & Order dated 25.10.2019 probated the Will dated 15.08.2014.

[6.] The present respondent, who was also the respondent in the probate case, being aggrieved filed a Regular First Appeal before the Court of District Judge, Aizawl and the same was registered and numbered as RFA No. 26/2019. The appeal was thereafter disposed of vide Judgment & Order dated 02.02.2021

by setting aside the Judgment & Order dated 25.10.2019 passed by the learned Civil Judge, Aizawl in Probate Case No. 3/2015 and declaring the Will dated 15.08.2014 presented by the appellant as void under Section 8(1) of the Act of 1956. The appellant being aggrieved with the same, has filed the instant appeal.

[7.] This Court vide Order dated 31.05.2022 while admitting the appeal and issuing notice to the respondent, formulated 3 (three) substantial questions of law to be considered. Subsequently, on 18.07.2024 when the matter was listed for hearing, the learned counsel for the respondent made a proposal for formulation of one more substantial question of law. Although the same was objected to by the learned counsel for the appellant, but it was finally agreed upon by the parties that instead of hearing the objection on a piece meal basis, the entire matter be heard i.e., the 3 (three) substantial questions of law already formulated and the additional substantial question of law suggested by the learned counsel for the respondent. Accordingly, 4 (four) substantial questions of law were taken on board to be considered vide Order dated 23.07.2024. The same are abstracted hereunder for ready perusal:

"(i) Whether Zirliana, the instant Appellant, not being the Legatee, can be said to have locus standi to file a petition to probate the Will dated 15.08.2014 executed by Smt. Vanhliri (L) and file the subsequent/connected Appeal in violation of the provisions of the Mizo Marriage, Divorce and Inheritance of Property Act, 2014?"

(ii) Whether the First Appellate Court could have relied upon the evidence adduced by PW No. 2 after he had submitted his withdrawal Letter dated 26.05.2015.

(iii) Whether the failure of the First Appellate Court to consider the evidence

adduced by the Appellant/petitioner and his other witnesses excluding the evidence adduced by the PW No. 2 H. Lalzuala and the evidence adduced by the Respondent/ Opposite Party and his witness has led to a failure of justice.

(iv) Whether the failure of the First Appellate Court in failing to apply the legal principles as given in Section 68 & 71 of the Indian Evidence Act, 1872 at the time of appreciating the evidence on record has led to failure of justice”.

[8.] Referring to the first substantial question of law, Mr. A.R. Malhotra, learned counsel submits that the learned First Appellate Court in its Judgment & Order dated 02.02.2021 passed in RFA no. 26/2019 at paragraph No. 6 of the judgment clearly held that a Will executed on the date averred would be governed by the Act of 1956. The said finding has not been challenged by the respondent by filing a cross appeal or a separate appeal. Therefore, the same having attained a finality, the respondent is only estopped from raising any objection at this stage.

[9.] Adverting to the second, third and fourth substantial questions of law together, Mr. A.R. Malhotra, learned counsel submits that one of the witness to the Will Sh. H. Lalzuala, who was examined as PW-2 in his Examination-in-Chief deposed before the Trial Court that on 15.08.2014, he and his wife went to the residence of Smt. Vanlalhliri as the latter was to prepare a Will. Sh. Zirliana, the instant appellant and Sh. K. Hrangluaia i.e., the other witness were also present. He read out the contents of the Will and before any of them gave their signatures, his wife Smt. Lalrinmawii read out the Will for all of them. Smt. Vanlalhliri then put her thumb impression on the Will, followed by the signatures

of the witnesses and the appellant. After the Will was signed, PW-2 kept the same inside an envelope and sealed it.

[10.] PW-2 further deposed that Smt. Vanlalhliri did not prepare any other Will apart from the said Will and that no force or coercion was involved in the preparation of the Will. Smt. Vanlalhliri was ill but however, he knew that she had prepared the Will with a sound mind. The learned counsel submits that PW-2 thereafter on 26.05.2015 submitted an application before the Court of Civil Judge for withdrawal as a witness to the Will and for the cancellation of the statements made by him on 18.05.2015.

[11.] PW-2 however appeared before the Court subsequently on 13.12.2016 and he was cross examined by the respondent as well as by the counsel for the appellant. In his cross examination by the respondent, PW-2 stated that there was a modification in the contents of the Will and after the modification was made, he gave his signature in the house of the appellant and it was only the appellant who was present at that time. He gave his signature by back-dating the date as 15.08.2014. PW-2 on being cross examined by the counsel for the appellant stated that it was he who had sealed the Will dated 15.08.2014 in the envelope and that he cannot point out the difference in the contents of the Will dated 15.08.2014 and the alleged modified Will. He could not say whether the Will submitted before the Court for probate was the Will executed in the presence of the witnesses or the alleged modified Will. He also stated that he still believed that the statements recorded on 18.05.2015 before the Court are true and correct.

[12.] Mr. A.R. Malhotra, learned counsel submits that despite claiming that

there was a modified Will, PW-2 could not make out the difference between the Will executed in front of the witnesses and the alleged modified Will and therefore, PW-2 having failed to point out the same and having failed to produce the modified Will, the learned First Appellate Court committed an error in relying upon the evidence of PW-2.

[13.] Referring to Section 68 of the Indian Evidence Act, 1872 (Evidence Act), the learned counsel submits that a document can be proved with the evidence of one attesting witness. He submits that since the other witness Sh. H. Hrangluaia was examined as PW-3, his evidence alone was sufficient to prove the Will.

[14.] The learned counsel submits that under the provisions of Section 71 of the Evidence Act, if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. The other evidence available in the probate proceeding is the evidence of DW-2, who is also one of the beneficiary named in the Will. In her deposition before the Probate Court, DW-2 during her cross examination, stated that she had seen the Will dated 15.08.2014 and that at the time of making the Will by Smt. Vanlalhliri, who is also her mother, 3 (three) persons were present, namely the instant appellant and the 2 (two) witnesses to the Will Sh. H. Lalzuala and Sh. K. Hrangluaia.

[15.] Mr. A.R. Malhotra, learned counsel further submits that even the respondent himself in his deposition as DW-1 admitted that DW-2 knew that the Will was executed on 15.08.2014, although she did not know the contents of the Will. Therefore, having regard to the prescription of Section 71 of the

Evidence Act, the Will was only proved by the appellant and the learned Probate Court rightly probated the Will. The learned counsel in support of his submission relies upon the case of *M.B Ramesh (Dead) by LRS Vs. K.M. Veeraje URS (Dead) by LRS & Others, (2013) 7 SCC 490*.

[16.] Mr. A.R. Malhotra, learned counsel also submits that Smt. Vanlalhliri, who made the Will dated 15.08.2014 although may not have been in good health but she made the Will with a conscious mind and with her own free will without any force or coercion. The findings of the Probate Court and the First Appellate Court on this point were also concurrent. However, without any valid reason, the learned first appellate Court relied heavily on the evidence of PW-2 while ignoring other relevant material evidences. Therefore, the impugned Judgment & Order of the First Appellate Court being erroneous and misconceived, the same should be set aside and the probate granted by the Probate Court to the Will dated 15.08.2014 should be up-held.

[17.] Mr. Lalfakawma, learned counsel for the respondent, on the other hand submits that the Act of 1956 has been repealed by the Mizo Marriage, Divorce & Inheritance of Property Act, 2014 (Act of 2014) and that Section 29(7) of the Act of 2014 provides that the legatee will be the executor of the Will and that probate can be granted by the Court by production of the Will in original by the executor. However, in the instant case, the appellant is not a legatee to the Will dated 15.08.2014 and therefore, the probate granted by the Probate Court cannot be sustained. He submits that since the instant appeal is a continuation of the probate case and therefore, the respondent cannot be prevented from disputing the jurisdiction of the Probate Court in entertaining the Will produced by a person other than the legatee. He submits that from a

perusal of the relevant provisions of the Act of 2014, it is clear that the appellant has no locus standi to file the probate application. In support of his submission, the learned counsel relies upon the case of *Chandrabhan (Deceased) Through Lrs. & Others Vs. Saraswati & Others, 2022 SCC Online SC 1273*.

[18.] Mr. Lalfakawma, learned counsel further submits that in so far as Section 71 of the Evidence Act is concerned, what has to be determined by the Probate Court is as to whether the Will exists and secondly whether the Will was executed as per law. Referring to the evidence of DW-1 and DW-2, the learned counsel submits that it can be plainly seen that Smt. Vanlalhliri was very sick and was in no condition to apply her mind in making the said Will. It can therefore be clearly seen that Smt. Vanlalhliri does not come under the description of person of a sound mind provided under Section 29(1) of the Act of 2014. Therefore, the Will dated 15.08.2014 is void ad initio. He further submits that in so far as the claim of the learned counsel for the appellant that the evidence of DW-2 supports the case of the appellant, the learned counsel submits that if the evidence is to be relied upon by the appellant, the entire evidence should be taken into consideration and not on a piece meal basis. He also submits that the Will at any rate is too lengthy and not practical for actual execution besides Smt. Vanlalhliri being very sick at the relevant time. Therefore, the First Appellate Court rightly declared the Will to be void.

[19.] Mr. Lalfakawma, learned counsel further submits that as per Section 154 of the Evidence Act, the party who produces a witness cannot question his own witness without the permission of the Court. In the instant case, no such permission appears to have been granted by the Court and therefore, the cross

examination of PW-2 by the appellant will have no evidentiary value.

[20.] The learned counsel finally submits that the change in law has to be taken into account by the Court while deciding the case. Since the Act of 1956 has been repealed by the Act of 2014, the probate of the Will has been rightly interfered with by the First Appellate Court. The appeal therefore being without merit, the same should be dismissed. In support of his submission, the learned counsel relies upon the case of *Lakshmi Narayan Guin & Others Vs. Niranjan Modak, (1985) 1 SCC 270*.

[21.] I have heard the submission made by the learned counsels for the rival parties and I have perused the materials available on record. The Act of 2014 came into force w.e.f. 13.02.2015. The Will was said to have been made on 15.08.2014 and Smt. Vanlalhliri expired on 02.12.2014. The probate application was filed by the appellant on 27.04.2015. The fact however remains that when the Will was made on 15.08.2014, the Act of 2014 had not come into force. The respondent in the probate case had not taken any objection with regard to the maintainability of the probate application in view of the Act of 2014, having provided that the legatee will be the executor of the Will. The First Appellate Court in its Judgment & Order dated 02.02.2021 passed in RFA No. 26/2019 at paragraph No. 6 also held that the Will executed on the date averred would be governed by the Act of 1956. The same has neither been challenge nor objected to by the respondent at any point of time. This apart, the Will executed under the Act of 1956 i.e., prior to the coming into force of the Act of 2014 cannot be rendered to be futile and that the repeal and saving clause of the Act of 2014 only takes care of this situation. Such being the case, the objection raised by the respondent in this regard will have to be over-ruled.

[22.] In order to probate the Will, the appellant examined himself as PW-1 and the 2 (two) witnesses to the Will as PW-2 and PW-3 apart from other witnesses. All the witnesses including PW-2 deposed in favour of the genuineness of the Will. However, as may be noticed, PW-2 submitted an application for withdrawal as a witness of the Will, but despite the same, he appeared before the Court and got himself cross-examined on a subsequent date. The learned First Appellate Court has mainly relied upon the deposition of PW-2 which was to the effect that he did not see any other person signing the Will when the same was modified at a later date. PW-2 has not stated as to when the said Will was modified and what were the contents of the Will which was witnessed by everyone and the contents of the subsequent modified Will. In other words, he stated that he could not say anything about the difference between the Will witness by the witnesses and the subsequent modified will.

[23.] Section 5(2) of the Act of 1956 provides that the testator of a Will may not disclose the contents of the Will to the witnesses or to the legatee. However, in the instant case, PW-2 in his Examination-in-Chief deposed that on 15.08.2014, he and his wife went to the residence of Smt. Vanlalhliri to prepare a Will. He read out the contents of the Will before anyone signed on the Will. His wife Smt. Lalrinmawii also read out the Will before everyone. Further, it was he who claimed to have put the Will in a sealed envelope. It is therefore surprising that despite having read the Will which was witnessed by all the persons concerned and thereafter, having claimed to have signed the modified Will later on, he still did not know the difference between the two. It may also be seen that there were 2 (two) witnesses to the Will and having regard to the provisions of Section 68 as well as Section 71 of the Evidence Act, the evidence

of the other witness to the Will and the evidence of the rival parties overall can be considered to be sufficient to accept the Will as genuine and accordingly be probated.

[24.] In adjudicating the application for probate of the Will, the learned Trial Court against issue No. 1 framed which was whether Smt. Vanlalhliri was of sound disposing state of mind or not held that though she was unable to move her hand and legs due to her sickness, there was no evidence or material including Exhibit D-1 which was Medical Certificate/Prescription of the Doctor concerned to show that Smt. Vanlalhliri was mentally unfit and unconscious to make the Will. The Court therefore held that mere physical disability due to her sickness did not render her to be unfit for making a Will if she was conscious and free from mental problem. The issue was therefore decided in favour of the appellant.

[25.] The First Appellate Court at paragraph No. 14 of the impugned Judgment & Order also concurred the findings of the learned Trial Court on the mental capacity of the deceased to make a Will and her title to make a testamentary disposition of the land. In view of such concurrent findings in this regard, this Court has no reason to have a different view on the capability of late Smt. Vanlalhliri to make the Will.

[26.] With regard to the applicability of Sections 68 and 71 of the Evidence Act, the Apex Court in *M.B Ramesh (Dead) by LRS (supra)* in the given facts of that case by referring to another case of the same Court namely *Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, (2003) 2 SCC 91* held that Section 71 of the Evidence Act is another connected section to Section 68 of the Evidence Act

which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances and in a way reduces the rigour of the mandatory provision of Section 68. Section 71 is meant to lend assistance and come to a rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. It was also observed that the same however does not absolve a party from the obligation under Section 68. Applying the said ratio to the instant case, it may be seen that the appellant had examined DW-3 apart from DW-2 and therefore, even by not relying the evidence of DW-2, the other evidence led by the appellant while also accounting the evidence of the respondent, does not caste any doubt on the genuineness of the said Will.

[27.] Thus, the substantial questions of law accordingly stands answered as above and upon due consideration of the case and its entirety, I find merit in the appeal and accordingly, the impugned Judgment & Order of the First Appellate Court dated 02.02.2021 is hereby set aside and the Judgment & Order of the Probate Court dated 25.10.2019 up-held.

[28.] The appeal accordingly stands disposed of as allowed.

JUDGE

Comparing Assistant