

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.247 of 2011

(Against the order dated 05.06.2010 passed by the learned Additional District Judge, F.T.C. V, Sheikhpura in Probate Case No.11 of 2008 allowing the probate case).

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Sri Rabindra Kumar

.... 2nd Party-Appellant

Versus

Shakuntala Devi & Ors

.... Applicants-Respondents

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Appearance :

For the Appellant/s : Mr. Dronacharya, Advocate
Mr. Ram Niwas Prasad, Advocates.
For the Respondent/s : Mr. Anil Kumar Jha, Sr. Advocate
Mr. Pramod Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 29-01-2015

1. This Miscellaneous Appeal has been filed under Section 299 of the Indian Succession Act, 1925 against the judgment and order dated 05.06.2010 passed by the learned Additional District Judge, F.T.C. V, Sheikhpura in probate case No.11 of 2008.

2. The applicant-respondent, Shakuntala Devi filed the application under Section 276 of the Indian Succession Act for the grant of probate with respect to the Will dated 25.06.1997 said to have been executed by her father namely, Tula Singh. The appellant herein filed objection to the said probate case alleging that the testator, Tula Singh has not executed the said Will. Thereafter, the court below after consideration of the evidences, by the impugned judgment and order, allowed the probate case. Against the said order, the present

appeal has been filed.

3. The learned counsel, Mr. Dronacharya appearing for the appellants firstly submitted that no issues were framed by the learned trial court and evidences were adduced by the parties. Secondly, the learned counsel submitted that on the death of Sharda Devi, who was party, no substitution application was filed, therefore, the order impugned is against a dead person. Thirdly, the learned counsel submitted that in fact, the alleged Will is not a Will rather it is a Panchnama, therefore, the application under Section 276 of the Indian Succession Act itself was not maintainable. Fourthly, the learned counsel submitted that the court below has not considered the evidence of the appellant who was examined as D.W.1. Fifthly, the learned counsel submitted that the L.T.I. of Tula Singh on the so called Will has not been marked as Exhibit in this case and, therefore, the impugned judgment/order is vitiated. The learned counsel lastly submitted that one of the attesting witnesses has not been examined namely, Janardan Singh. The other attesting witness has been examined as court witness and that, after contest, the probate case should have been converted to regular title suit as provided under Section 295 of the Indian Succession Act.

4. On the other hand, the learned senior counsel, Mr. Anil Kumar Jha appearing on behalf of the respondents submitted that



in fact, after going through the contents of the document, the court below clearly recorded a finding that it is a Will and not a Panchnama. Only because the heading has been mentioned as Panchnama, it will not change the nature of the document. The intention of the party executing the document has to be gathered from the contents of the deed. The learned counsel further submitted that according to Section 68 of the Evidence Act, one of the attesting witnesses has already been examined. The Will itself has been marked as Exhibit I. In the Will, the testator, Tula Singh has mentioned that although, he is a literate person but because his hand was trembling, he has given the L.T.I. instead of signing the document. According to the learned counsel, in probate case, only question to be decided is whether the Will is genuine or not, therefore, non-framing of any issue will not vitiate the judgment/order because the learned court below has formulated the point for decision and thereafter the court considered the evidences of the parties. The learned counsel further submitted that Sharda Devi, who was party in the probate case, appeared in the year 2009 but she did not file any written statement. In other words, she did not contest the probate case, therefore, it was not necessary to substitute the legal representatives of the deceased, Sharda Devi and moreover, the legal representatives of Sharda Devi are not approaching the court or challenging the order passed by the court



below. The learned counsel further submitted that so far conversion of probate case to a title suit is concerned, it is only a procedural method, therefore, it will not affect the order passed by the court on merit. On these grounds, the learned counsel submitted that the Miscellaneous Appeal be dismissed.

5. In view of the aforesaid submission of the parties, the question arises for consideration in this appeal is as to “whether the Exhibit I is a Will or a Panchnama and if it is Will, whether the applicant-respondent no.1 is entitled for the grant of probate under Section 276 of the Indian Succession Act, 1925?”

6. Admittedly, in the document, it is mentioned as a Panchnama. However, from perusal of the document, it appears that in the contents, it has been mentioned clearly that on the death of the testator, Tula Singh, the property will go to the third daughter, Shakuntala Devi. The reason has been assigned in the document why this document has been executed and why the name of the document has been mentioned as Panchnama.

7. The five Judges Bench of the Hon’ble Supreme Court in the case of **Ramkishorelal and another v. Kamalnarayan, A.I.R. 1963 Supreme Court 890** has held that the golden rule of construction of a document, it has been said, is to ascertain the intention of the parties to the instrument after considering all the



words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Same view has been taken by this Court in the case of **Harihar Prasad Sao v. Bhagwan Das and others, A.I.R. 1972 Pat. 146**. In view of the aforesaid settled principles of law, only because the heading has been mentioned as Panchnama, it cannot be said that it is a Panchnama and not a Will. As stated above, from perusal of the document, it appears that in fact, the document is a Will, therefore, the probate application under Section 276 of the Indian Succession Act is maintainable.

8. It appears that one of the testators namely, Anandi Singh has been examined as applicant-witness no.1. He has proved the document as Exhibit I. According to Section 68 of the Evidence Act, it is not necessary to examine both the attesting witnesses. However, in the present case, it appears that the court by precautionary measure has examined other attesting witness as court witness no.1. So far the objection filed by the appellant is concerned, it may be mentioned here that his objection is only to the effect that the document is forged and fabricated. The other objection is that the applicants-respondents had already sold her share in the property, therefore, she is not entitled to get any property. In the decision of



this Court in the case of Harihar Prasad Sao(supra), it has been held by this Court that once it is proved by the applicant that the document was validly executed by examining the attesting witnesses, the onus shifts on the other side but in the present case, the appellant has only been examined as D.W.1 who has repeated the same thing as has been mentioned in his objection petition. No steps have been taken by him to discharge his onus to prove that the document is a forged document. So far the question of title is concerned, it is settled principles of law that in an application under Section 276 of the Indian Succession Act, the same cannot be decided even if a proceeding is contested by the defendant and it has been converted to regular suit according to Section 295 of the Indian Succession Act. In this matter, reference may be made to the decision of the Hon'ble Supreme Court in the case of **Krishna Kumar Birla v. Rajendra Singh Lodha & Ors., (2008) 4 Supreme Court Cases 300.**

9. So far framing of issue is concerned, the Hon'ble Supreme Court in the case of **Nedunuri Kameswaramma v. Sampati Subba Rao, A.I.R. 1963 Supreme Court 884** has held that when the parties went to trial and adduced evidences after fully knowing the case of each party, the non-framing of issue will not prejudice any party and on that ground, it cannot be held that the judgment/order is vitiated. As has been stated above, in the present



case, only question to be decided is whether the Will is genuine or not, therefore, framing of issue or non-framing of issue, both the parties were knowing this point to be decided. In my opinion, therefore, on this ground, the judgment passed on merit cannot be said to be vitiated. So far non-substitution of the legal representatives of Sharda Devi is concerned, admittedly, she never contested the probate case, therefore, the judgment will not be vitiated because of the non-substitution. Moreover, the legal representatives of Sharda Devi are not before this Court and they are not challenging the impugned order. So far non-consideration of the evidence of D.W.1 is concerned, as stated above, bald statement has been made by him in support of the objection filed by him. In such circumstances also, on that ground, the judgment cannot be said to be vitiated. Likewise, so far conversion of the probate case to a title suit is concerned, it is only a procedural method. Section 295 provides that if the probate case is contested then the same shall be converted to a title suit and the procedure applicable in cases of regular title suit will apply. In such circumstances, since the matter of conversion relates to procedural method, it will not vitiate the judgment passed by the court below.

10. In view of my above discussion, I find that the document, Exhibit I is a Will which has been proved by the applicant-respondent no.1 that it has been duly executed by her father, Tula

Singh in her favour and, therefore, the applicant-respondent is entitled for the probate. The finding of the court below is thus, confirmed.

11. In the result, this Miscellaneous Appeal is dismissed.

(Mungeshwar Sahoo, J)

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