

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.563 of 2011

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Sri Jaichand Prasad, son of Late Kishun Gope, resident of village-Didarganj, Patna City, P.O. and P.S. Didarganj, District-Patna.

.... Appellant

Versus

Smt. Sitabia Devi & others through their legal heirs.

.... Respondent

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Appearance :

For the Appellant/s : Mr. Jitendra Kishore Verma &
Mr. Anjani Kumar-Advocates

For the Respondent/s : Mr. Rabindra Kumar-Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 15-01-2016

Appellant/ opposite party being aggrieved by and dissatisfied with the judgment and order dated 25.04.2011 passed by the Additional District Judge-IIIrd, Patna City, Patna in connection with Revocation Case No.170 of 1999 arising out of Probate Case No.80 of 1983 whereby and whereunder revoked the probate granted vide order dated 15.07.1997 under Probate Case No.80 of 1983 relating to Will dated 30.05.1982, has filed instant appeal.

2. Respondent/ petitioners launched Revocation Case No.170 of 1999 for revocation, annulment of order dated 15.07.1997 passed in Probate Case No.80 of 1983 granting probate relating to a Will dated 30.05.1982 and for that, pleaded that one Dasho Gope was the common ancestor, who died leaving behind two sons Naraian Gope and Kishun Gope. In due course of time, Naraian Gope and Kishun Gope separated amongst themselves by metes and bounds,



and the property exclusively allotted to the share of Naraian Gope has been detailed under Schedule-A of the plaint. Naraian Gope died leaving behind only two daughters, who are none else than these two petitioners and accordingly, even after their marriage, they continued in giving all sorts of service, hospitality, care to their father Naraian Gope, who died on 17.07.1982 leaving behind his widow Mosmat Jagdaiya Devi and these two petitioners. Naraian Gope died intestate. Last rite, Shradh etc. was performed by the son of petitioner, Sitabia Devi.

3. It has further been pleaded that wife of Late Naraian Gope namely Jagdaiya Devi, mother of these two petitioners died on 23.05.1993, intestate leaving behind these two petitioners as successor. Her last rite as well as shradh was performed by these two petitioners and was well known to all.

4. It has further been submitted that these two petitioners are legal heirs of Late Naraian Gope as well as Late Jagdaiya Devi and are coming over the lands so detailed under Schedule-A of the land peacefully.

5. It has further been averred that on 27.07.1999, they came to know from Karmchari that opposite party has taken recourse for Mutation of his name in place of Naraian Gope with regard to the properties detailed under Schedule-A of the plaint on the basis of probate granted in his favour on the basis of a Will alleged to be

executed by Naraian Gope and then thereafter, rushed to the Court, got the record inspected and then, came to know with regard to mischief and fraud committed by the opposite party.

6. It has further been stated that opposite party, after death of Naraian Gope filed a petition for grant of probate with respect to Schedule-A property on the basis of unregistered Will dated 30.05.1982, claiming it as a genuine as well as last Will of deceased Naraian Gope in his favour.

7. On this score, it has been pleaded that no such kind of document had ever been executed by the Naraian Gope and on account thereof, the aforesaid deed happens to be forged, fabricated as well as collusive one. It has also been stated that it does not bear L.T.I. of Late Naraian Gope rather the aforesaid forged document has been created by the opposite party with the aid and assistance of his henchmen. It has further been stated that at the relevant time, during course of which, alleged Will is said to be executed by the aforesaid Naraian Gope, was incapable to understand on account of old age as well as being suffering from mental equally with physically infirmity.

8. It has further been submitted that forgery during preparation of alleged Will is itself apparent from the fact that neither presence of mother of these petitioners nor presence of these petitioners have been divulged in alleged forged Will and in likewise manner, petitioners were not at all cited in the petition filed for grant



of probate (Probate Case No.80 of 1983) and on account thereof, no notice was served upon these petitioners disentitling them to appear and object grant of Will at the proper stage. Furthermore, it has also been pleaded that the original petition is not verified and signed by one of the attesting witness. Furthermore, it has been pleaded that opposite party had not accepted inventory.

9. It has also been submitted that deceased Naraian Gope as was cared by his wife and these two petitioners and further, deceased Naraian Gope had great affection towards these petitioners, on account thereof, there was no genuine cause to deprive these petitioners from succession of Schedule-A property by way of executing a Will in favour of opposite party. As such, asked for revocation of the probate as indicated above.

10. Appellant/ opposite party appeared and filed his objection denying the averments whatsoever been made on behalf of petitioners for the purpose of revocation. It has further been submitted that instant petition for revocation is not maintainable in the background of the fact that while petition for probate was pending, the parties were fighting under Mutation Proceeding as well as before the survey authority wherein there happens to be specific disclosure at his end regarding pendency of probate case, but petitioners have not chosen to appear and on account thereof, they would not be entitled to challenge the same as they have waived their right and on that very

score, now are estopped.

11. It has also been submitted that the opposite party is not stranger to the family rather he happens to be own nephew and being so, he had provided as well as tendered all sorts of facility, service to his uncle deceased Naraian Gope and having pleased, bequeathed the property by the impugned Will. It has further been submitted that wife of Naraian Gope, predeceased him and further, these two petitioners used to stay at their sasural after marriage and as they failed to care their father deceased Naraian Gope, on account thereof, Naraian Gope suffered from frustration and that happens to be reason behind that he had not made any sort of provision relating to the petitioners in the Will. Furthermore, it has also been submitted that it was the opposite party, who took care and after death of Naraian Gope, gave Mukhagni and performed Shradh. Therefore, refuting the grounds, allegations enumerated under main petition, it has been submitted that the will is genuine one executed by deceased Narain Gope in sound mental, physical condition in presence of attesting witnesses. Hence, petition for revocation is not maintainable and is fit to be dismissed.

12. On perusal of rival pleadings, the learned lower Court had framed following issues:-

- (i) *Whether application as framed is maintainable?*
- (ii) *Whether the grant of probate was obtained*

fraudulently by making a false suggestion in the will that the wife of testator predeceased him?

(iii) Whether grant of probate was made without citing parties who ought to have been cited?

(iv) Whether the will of which probate was granted is forged and fabricated and also surrounded with suspicious circumstances?

(v) To what relief or reliefs if any, applicants are entitled?

And decided the issue in favour of petitioners against the opposite party, whereupon, allowed the petition by way of revoking the probate granted vide order dated 15.07.1997 in connection with Probate Case No.80 of 1983, hence this appeal.

13. While challenging the order impugned, it has been submitted on behalf of appellant that learned lower Court had transgressed its limit as well as also deflected itself from the settled principle of law. In order to substantiate such plea, it has been submitted that learned lower Court should have taken into consideration that during course of litigation having fought amongst the parties in a mutation proceeding, appellant had already disclosed regarding presence of Will having in his favour and on account thereof, respondents were well aware regarding pendency of a proceeding for grant of probate. They intentionally withheld themselves to appear and contest. That being so, it will be deemed that they have had waived their right and now, they happen to be

estopped from challenging grant of probate.

14. Furthermore, it has been submitted that citation in its literal sense was not made, but presence of two daughters have been enumerated and on account thereof, it should not be deemed to be non-compliance rather it was mere an irregularity, which could not be found adverse to the interest of appellant nor makes the proceeding invalid. Moreover, the aforesaid theme would have been taken into consideration in the background of having fully acknowledge with the pendency of probate case by the respondents during course of mutation proceeding and on account thereof, having defect over non-compliance relating to citation would not be considered as a severe one. Because of the fact that mandate of citation is to acknowledge the parties having interest in the property left, possessed by the deceased, had he died intestate which is found completely satisfied. As such, absence of citation could not be considered as a major defect as has been held by the learned lower Court.

15. Furthermore, it has also been argued that learned lower Court should have, even allowing the petition filed by the respondents given an opportunity to the appellant to proceed afresh in order to satisfy the genuineness of the Will instead of closing the chapter forever. To explain the aforesaid event, the learned counsel for the appellant flashes an example that whenever an ex parte order is recalled, the main suit became alive and fresh trial is allowed to

proceed. Therefore, the learned lower Court instead of acting in similar way, adopted wrong path.

16. It has further been submitted that learned lower Court should have considered that in the facts and circumstances of the case, no apparent grounds were visible whereupon Will could be held forged one. Hence, the order impugned is illegal, bad and is fit to be set aside. It has also been submitted that probate was granted vide order dated 15.07.1997 while the suit was filed in the year 1983 bearing Probate Case No.80 of 1983 and the revocation petition was filed in the year 1999, on account thereof, is found barred by law of limitation.

17. On the other hand, the learned counsel representing the respondents have controverted the submission made on behalf of appellant and submitted that apart from the ground relating to absence of citation, another ground, so presented, for revocation happens to be over commission of forgery during preparation of Will and that happens to be reason behind that while filing petition for revocation of probate of Will, it has also been alleged apart from absence of citation, the Will in question, being forged and fabricated one.

18. Furthermore, it has been submitted that with regard to knowledge since before or during the pendency of earlier Probate Case No.80 of 1983 by way of disclosure at the end of the appellant during course of mutation proceeding, the same was misconceived

and the aforesaid theme has been dealt with in detail by the learned lower Court after considering the evidence. Therefore, plea of the appellant that they have disclosed with regard to pendency of probate case happens to be far from the truth. Even during course of evidence, the appellant had not substantiated the same by cogent and reliable evidence.

19. Now, coming over another aspect of the finding recorded by the learned lower Court, it has been submitted that while filing petition for revocation of probate, respondents have emphatically pleaded that so alleged will happens to be forged one and aforesaid theme was properly answered by the appellant while filing objection. Not only this, the appellant was fully known to the fact on account of framing of issue on that very score, led evidence and after hearing both the parties, the aforesaid issue has been decided against the appellant in favour of respondents. Therefore, now the appellant has got no say to challenge the aforesaid finding. So, submitted that the order impugned is fit to be confirmed.

20. "Will" after having been executed by a testator is to be placed before the District Judge by the propounder for the grant of probate or letter of administration, as the case may be, so that it could have a legal identity. For filing petition for the grant of probate, certain requirements have been prescribed as enumerated and further, as per Section 283(c), (2) Citation has to be in accordance with law.



Citation denotes details of those, who have got interest in the property left by deceased in case would have died, intestate. There is no hitch or controversy that the respondents being daughters were entitled to inherit the property left by the deceased, their father, Narayan Gope had there been no Will. Whatever status of appellant may have, he was out of ambit of inheritance in case deceased, Narayan Gope had died intestate. Therefore, presence of these respondents were necessary so that either they could have supported the factum of alleged Will dated 30.05.1982 having in favour of Jaichand Prasad, allegedly executed by deceased Narayan Gope or to have contested the same and by such omission, appellant deprived them off the legal right to contest and by such action allowed Probate Case No.80 of 1983 to sail without any hindrance, virtually in ex parte manner.

21. Furthermore, as is evident from the lower court record, the appellant failed to substantiate by cogent and reliable evidence that he had placed an information while contesting the mutation proceeding, more particularly, in the background of the fact that the aforesaid Probate Case No.80 of 1983 was dismissed for non-prosecution on 04.09.1986 and was restored on 07.02.1997. Therefore, there happens to be substance in the assertion of the respondents while praying for revocation of the probate. At the present juncture, the cross-examination of respondents have to be taken into consideration. AW-2 is Smt. Sitabia Devi @ Sitabi Devi,



who was not at all cross-examined on that very score, nor even been suggested. AW-3 is Smt. Sita Pati Devi, who in Para-3 of her examination-in-chief had stated that she was not known with regard to pendency of probate case. When she came to know regarding grant of probate then thereafter, she along with her sister had filed instant petition. Again, she was not cross-examined on that very score. AW-4 is Nashib Lal, husband of Sita Pati Devi and his evidence also lacks specific cross-examination on that very score. DW-7 is Jaichand Prasad, who during his examination-in-chief had stated that both the applicants and her family members were known to the Will as well as Probate Case. In Para-5, he had further stated that these applicants have filed objection during course of survey operation wherein they lost on the basis of Will. During cross-examination at Para-13, he had stated that he is not aware the nature of proceeding contested before the Survey Authority as well as before the Circle Officer, but it was relating to probate. In Para-17 as well as in Para-22 of his cross-examination, it is evident that he failed to disclose what kind of papers were filed during the litigation before the Survey Office as well as before the D.C.L.R. and on account thereof, his plea that he had already disclosed regarding pendency of Probate Case is not at all found substantiated.

22. Had there been sole ground for revocation on account of absence of proper citation as well as had there been absence of one

of the ground for revocation as forgery, certainly, the learned lower Court would have been excluded from adjudicating upon the second aspect, being the Will in question to be forged. For better appreciation Section 263 of the Indian Succession Act, 1925 is quoted below:-

“263. Revocation or annulment for just cause. —The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation. —Just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations

(i) The Court by which the grant was made had no jurisdiction.

(ii) The grant was made without citing parties who ought to have been cited.

(iii) The Will of which probate was obtained was forged or revoked.

(iv) A obtained letters of administration to the estate of B, as his widow, but it has since

transpired that she was never married to him.

(v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

(vi) Since probate was granted, a latter Will has been discovered.

(vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the Will.

(viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.”

23. So, from plain reading of Section 263 of Succession Act, it is evident that the probate or letter of administration with regard to a Will in question can be revoked or annulled on the just ground which have been enumerated therein, and further magnifies with the illustration in consonance there with. Therefore, the grant of probate or Will can be revoked or annulled, had there been the grounds so enumerated duly substantiated.

24. So far, facts of the present case is concerned, it is evident that many more grounds have been taken for revocation. The first one is with regard to absence of citation, and the second one putting stray over nature of Will to be forged. There two grounds found duly recognized as per illustration (II) as well as (III). Having such plea having duly replied as well as after framing of issue on that score, whereupon evidences have been adduced on behalf of respective parties is indicative of the fact, that appellant/ O.P. was

well versed with the lis. Therefore, having submission of the end of appellant/O.P. that after revoking probate, the learned lower Court should have proceeded with main proceeding to decide genuineness of Will in presence of Respondent/ Applicant is found not tenable.

25. To adjudge over the issue, it is evident that respondent/ applicant simply challenged genuineness of the alleged Will not to be a Will executed by Narain Gope, deceased. To rebut the appellant/ O.P. had examined two witnesses apart from himself including others. Before coming to discuss the evidences of the PWs, Exhibit-A, Will has been gone through. Usually, while document is being scribed, all the endorsement is being made at the right side of document, while the Exhibit-‘A’ contains it at left side. In terms of Section 63(c) of the Succession Act, two witnesses are needed to validate the Will, while in the present case, Exhibit-‘A’ contains presence of three witnesses out of whom AW-2 is identifier while AW-1 as well as deceased Deo Narain happen to be witness. Furthermore, Exhibit-‘A’ is in seven pages out of which only three pages contains presence of witnesses. Furthermore, it is evident that document has been scribed on 29.05.1982 while signature of identifier as well as witnesses happen to be dated 30.05.1982 having no explanation at the end of appellant on this score.

26. While coming over evidence of PWs on this score, O.P.W. No.1 Agnu Mistri in his examination-in-chief had stated that



document was scribed in his presence at the wish of Narain Gope which was read over to Narain Gope, who put his L.T.I. Ram Bharosa had signed at the direction of Narain Gope. He along with Deo Narain Gope also put their signature. During cross-examination O.P.W. No.1 Aganu Mistri, attesting witness at Para-7, Para-8, Para-9 had exhibited (Exhibit-1) another document to be a Will executed by the deceased, Narayan Gope dated 30.05.1982, which was typed one bearing his signature as well as signature of others including L.T.I. of Narayan Gope and had further, by such evidence created doubt over genuineness of document in question, because of the fact that in Para-8 of his cross-examination, he had admitted that he had signed over only one paper at the instigation of Narayan Gope, deceased. Two documents have been brought up on record, one at the instance of appellant and the photo copy obtained from notary public by the respondents, which was admitted by O.P.W. No.1 and got it exhibited as Exhibit-1,

27. O.P.W. No.2 is Ram Bharosa Rai, the Identifier. He had stated that after writing of the document by the scribe at the wish of Narain Gope, the scribe read over to Narain Gope, who put his L.T.I. which was identified by him. Aganu and Deo Narain stood as witness. In Para-5 of his examination, he had disowned his signature over any typed Will. At Para-11, he stated that he had gone to the house of Kamdeo Munsu where he put his signature on 30.05.1982.



28. O.P.W. No.7 is Appellant/ O.P. himself, who under Para-7 of his examination-in-chief, had denied existence of Exhibit-1. However, failed to recall O.P.W. No.1 on that very score to explain nor, attempted to controvert signature of O.P.W.-1, O.P.W.-2 over Exhibit-1, the photo copy of typed copy of Will. Not only this, none of the witnesses could be able to explain when the document was scribed on 29.05.1982, what was occasion for having the signature/ L.T.I. on 30.05.1982. Contrary to it, there happens to be consistent evidence of O.P.W.-1, O.P.W.-2, O.P.W.-7 that document was scribed, read over to Narain Gope, who put his L.T.I. in presence of identifier as well as witnesses who also put their signatures. By such evidence, a doubt cropped up over the genuineness of the Will leading & substantiating a cogent reason to revoke the Will.

29. Although, there happens to be recital of Will Exhibit-‘A’ over uncordial relationship amongst father and daughter, but the same is found duly controverted by the witnesses, who had asserted that relationship amongst father and daughter was cordial.

30. While considering the viability of Will, ignoring blood relation, it has been observed by the Hon’ble Apex Court reported in A.I.R. 2015 SC 2149 under Para:-

“46. The materials on record, as a whole, also do not, in our comprehension, present a backdrop, in which, in normal circumstances, the



testator would have preferred the appellant to be the legatee of his property as set out in the Will, Ex. A-1, by denying his wife, children and grand children who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is ex facie unnatural, unfair and improbable thus reflecting on the testator’s cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, in our opinion, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument”.

31. Consequent thereupon, instant appeal is found devoid of merit and is accordingly, dismissed. However, in the facts and circumstances of the case, parties will bear their own costs.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-15.01.2016
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