

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.2201 of 2008

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Smt. Pratima Singh

.... Petitioner/s

Versus

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. R.K.P.SINGH
Mr. Bal Bhushan Choudhary
Mr. Manish Kishore

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
ORAL JUDGMENT

Date: 17-08-2017

1. Heard learned counsel for the petitioner and perused the record.

2. This petition under section 115 of the Code of Civil Procedure, 2008 has been filed on behalf of the petitioner for setting aside the order dated 23.7.2008 passed by learned District Judge, Nalanda at Biharsharif in Misc. Case no. 89/2006 by which and whereunder he dismissed the aforesaid Misc. Case no. 89/2006 filed under Order IX rule 4 of the CPC and refused to restore Probate Case no.3/1992.

3. The brief facts of the present case are that the petitioner filed an application under section 276 of the Indian Succession Act on 21.7.1992 for grant of probate on the basis of the Will dated 22.7.1984 executed by Smt Dropdi Devi who died on 22.11.1984.

4. Petitioner claimed herself to be sole legatee and executor of the Will. On the basis of the aforesaid application, Probate Case



no.3/1992 was registered. However, after presentation of the aforesaid application under section 276 of the Indian Succession Act, seristedar of the court reported that Rs 3880/- was required as duty money and accordingly, the petitioner was directed by the court to deposit the aforesaid duty money and also a report regarding valuation was called for from the Collector, Nalanda. However, the aforesaid probate case was adjourned on several dates for depositing duty money as well as awaiting report of the Collector, Nalanda and in the meantime, on 4.3.1993, the petitioner filed a petition seeking adjournment to file objection against report of seristedar and on her prayer, again, matter was adjourned for several dates. Subsequently, vide order dated 30.9.1993, learned District Judge dismissed the aforesaid probate case as the petitioner could not file duty money.

5. After dismissal of the aforesaid probate case the petitioner filed a petition under section 151 of the Code of Civil Procedure for recall of the aforesaid order dated 30.9.1993 but the aforesaid petition was registered by learned District Judge as Misc. Case no. 59/1993. Moreover, the aforesaid Misc. Case no. 59/1993 was, too, dismissed on 29.4.1994 and after dismissal of the aforesaid Misc. Case no. 59/1993, the petitioner filed Misc. Case no. 89/2006 under Order IX rule 4 of the CPC praying therein to restore Probate Case no.3/1992 to its original number.

6. The impugned order of learned District Judge reflects that learned District Judge dismissed the aforesaid Misc. Case no. 89/2006 probably on two grounds. Firstly, he dismissed the aforesaid miscellaneous case on the ground that earlier for similar relief one



miscellaneous case i.e. Misc. Case no. 59/1993 had already been dismissed. Secondly, according to section 299 of the Indian Succession Act, 1925, every order passed by learned District Judge is appealable order. Although question of limitation was also raised by the office in respect of above stated Misc. Case no. 89/2006 but learned District Judge refused to entertain objection regarding point of limitation and mainly on above stated two grounds dismissed the aforesaid Misc. Case no. 89/2006.

7. Learned counsel appearing for the petitioner submits that, as a matter of fact, when seristedar made report regarding realization of duty money, petitioner raised objection and also prayed before the court for filing objection against the report of seristedar. He further submits that objection was prepared and filed by learned counsel of the petitioner but unfortunately, aforesaid objection was found missing from the record nor the order sheet of the court reflected filing of the aforesaid objection. He further submits that even if it assumed that objection against seristedar's report was not filed, then also, order dated 4.3.1993 shows that the petitioner was very much eager to file objection against report of seristedar. He further submits that admittedly, till passing of order of dismissal, report of Collector was also not received but learned District Judge did not take note of the aforesaid fact and dismissed Misc. Case no. 89/2006.

8. He, next, submits that no doubt, petition under section 151 of the Code of Civil Procedure was filed by the petitioner for recall of dismissal order dated 30.9.1993 but the learned District Judge in stead of keeping the aforesaid petition on the record of Probate



Case no.3/1992, registered Misc. Case no. 59/1993 though neither in the Code of Civil Procedure nor in Civil Court Rules, there is any provision to institute miscellaneous case on the basis of the petition filed under section 151 of the Code of Civil Procedure. Moreover, learned District Judge refused to exercise inherent power vested under section 151 of the CPC by dismissing the aforesaid Misc. Case no. 59/1993 and, therefore, even if learned District Judge refused to recall the dismissal order dated 30.9.1993 by dismissing Misc. Case no. 59/1993, then also, there was no impediment before the petitioner to make prayer under Order IX rule 4 of the CPC and similarly, there was no hurdle before the learned District Judge to allow petition filed under Order IX rule 4 of the CPC but learned District Judge failed to construe the provisions of Code of Civil Procedure in its letter and spirit .

9. Learned counsel for the petitioner further submits that so far as section 299 of the Indian Succession Act, 1925 is concerned, the same is not applicable in the present case because order dated 30.9.1993 has not been passed under the provision of the Indian Succession Act and section 299 of the Indian Succession Act applies only in those orders which are passed under the provision of the Indian Succession Act.

10. In support of his contentions, he relies upon decision of **Smt. Rajeshwari Mishra and another vs. Markandeshwar Mahadeo Trust and others reported in AIR 1965 Allahabad page 211 Lucknow bench** wherein their lordship held that it is not every order made by District Judge in probate case is subject to appeal but it



is every order made by him by virtue of power conferred by the provision of the Indian Succession Act that is subject to appeal. He also relies upon decision of **In the goods of Ernest Raymand Yakchee reported in AIR 1956 Allahabad page 152** wherein their lordship held that in probate case, the petitioner is not liable to pay amount of court fee and estate duty rather the court fee and estate duty are charged on the property of the person who has executed the Will deed.

11. On the strength of the aforesaid decisions, learned counsel for the petitioner submits that even if it assumed that the petitioner failed to deposit estate duty in time, then also, learned District Judge committed error in dismissing probate case in default rather best way was available to the learned District Judge to proceed with probate case and at the time of final order, he might be realized estate duty through due process of law.

12. Having heard contentions of learned counsel for the petitioner I went through the record as well as decisions cited on behalf of the petitioner.

13. As I have earlier stated that learned District Judge dismissed Misc. Case no. 89/2006 on two grounds. Firstly, Misc. Case no. 59/1993 was dismissed by him and secondly, section 299 of the Indian Succession Act creates a bar in setting aside order dated 30.9.1993 passed in Probate Case no.3/1992 but in my view, learned District Judge failed to notice distinguish feature of the present matter. He failed to notice that after dismissal of Probate Case no.3/1992 due to non-deposit of estate duty, the petitioner filed petition under section



151 of the Code of Civil Procedure to invoke inherent jurisdiction of the concerned court on the ground that objection against report of seristedar was to be filed but learned District Judge wrongly registered the aforesaid petition filed under section 151 of the Code of Civil Procedure as miscellaneous case no. 59/1993 because the aforesaid petition under section 151 of the CPC was filed in Probate Case no.3/1992. Moreover, Misc. Case no. 89/2006 was filed under Order IX rule 4 of the CPC and, therefore, even if learned District Judge had refused to exercise his inherent power vested under section 151 of the Code of Civil Procedure, then also, Misc. Case no. 89/2006 could not have been dismissed on the ground of dismissal of Misc. Case no. 59/1993.

14. Here, I would like to refer section 299 of the Indian Succession Act which runs as follows:-

Appeals from orders of District Judge.--- Every order made by a District Judge by virtue of powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals.

15. A bare perusal of the aforesaid provision goes to show that every order made by a District Judge by virtue of power conferred upon him under the Indian Succession Act shall be appealable and, therefore, the aforesaid provision makes it clear that in probate proceeding, if order is made by virtue of power conferred upon the District Judge under the Indian Succession Act then in that circumstance only, the order is appealable but if a procedural order is passed, then that order is not an appealable order. The order dated



30.9.1993 does not come under the purview of order made by a District Judge by virtue of power conferred to him under the Indian Succession Act,1925. Therefore, in my view, learned District Judge, Nalanda at Biharsharif committed error while dismissing Misc. Case no. 89/2006 on the above stated grounds.

16. Accordingly, this revision petition is allowed and impugned order dated 23.7.2008 passed by learned District Judge, Nalanda at Biharsharif is set aside as a result whereof Misc. Case no. 89/2006 is allowed and accordingly, Probate Case no.3/1992 is restored setting aside its dismissal order dated 30.9.1993. However, matter is very old, therefore, I request the District Judge, Nalanda at Biharsharif to proceed with the matter expeditiously and furthermore, petitioner must deposit estate duty within one month from the date of receipt/production of a copy of this order.

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(Hemant Kumar Srivastava, J)

AFR/NAFR	NAFR
CAV DATE	NA
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