

IN THE HIGH COURT OF ORISSA : CUTTACK
RSA No.339 of 2014

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 29.03.2014 and 11.04.2014 respectively passed by the learned Additional District Judge, Nabarangpur in RFA No.50 of 2005 confirming the judgment and decree dated 18.11.2010 and 4.12.2010 respectively passed by the learned Civil Judge (Senior Division), Nabarangpur in C.S. No.70 of 2006.

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Smt. Binodini Panda

:::: Appellant.

-:: VERSUS ::-

Smt. Padmini Panda & Others

:::: Respondents.

Advocate(s) who appeared in this case through virtual mode.

For Appellant

... M/s. Maheswar Mohanty, S.C. Dash,
S.N. Jena & R.B. Das,
Advocates

For Respondents

... None.

CORAM :

MR. JUSTICE D. DASH

Date of Hearing:10.01.2022 :: Date of Judgment:21.01.2022

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and preliminary decree dated 29.03.2014 and 11.04.2014 respectively passed by the learned Additional District Judge, Nabarangpur in RFA No.50 of 2005.

By the said judgment and preliminary decree, the Appeal filed by the present Appellant (Defendant No.1) with the Respondent Nos. 3 and 4 (Defendant Nos.3 & 4) under section 96 of the Code having been dismissed; the judgment and preliminary decree passed by the learned

Civil Judge (Senior Division), Nabarangpur in C.S. No. 70 of 2006 decreeing the suit filed by the Respondent No.1 as the Plaintiff in part holding her entitlement to 1/3rd share from out of the suit property and accordingly directing for partition with further observation that while allotting shares to the parties, the two (2) acres of agricultural land and ten (10) cents of homestead as shown in Schedule 'C' and 'D' of the plaint be adjusted to the share of the Plaintiff from out of the entire property taking into account the disposal and valuation thereof have been confirmed.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. **Plaintiffs' case:-**

It is stated that Raghunath Panda was the original owner of the land in question. Raghunath died leaving behind his widow namely, Sabitri. Girija Panda (Defendant No.2), Ashok, the husband of Defendant No. 1 and Pratap Chandra Panda, the husband of the Plaintiff are the daughter and two sons of Raghunath. It is stated that Sabitri died in the year, 2002 whereafter Ashok Kumar Panda, the husband of the Defendant No.1 died. Pratap Chandra Panda, the husband of Plaintiff died on 13.01.2004. Lastly, Raghunath Panda on 3.6.2006 possessed away. It is further stated that Punam, the only daughter born to Plaintiff also died sometime in August 2004. Raghunath was doing business and also having cultivation and executing contract works. The joint family had a house. It is stated that Raghunath's estate upon his death devolved upon the Plaintiff and Defendants in equal shares but the Defendants are in control of the same. It is further case of the Plaintiff that she having asserted for partition during the lifetime of her father-in-law; although

was assured about partition of the properties in equal part between both the daughter-in-laws, yet before that coming to materialize, he died before doing so. Therefore, the Plaintiff requested the Defendants to have an amicable partition of the properties left by her father-in-law and allot her share. But that was avoided on some pretext or other. When further attempts in that regard also failed, the suit has been filed.

4. The Defendant No. 2 supported the claim of the Plaintiff. The Defendant Nos. 3 and 4 being brought on record as parties at a later stage have not filed any separate written statement.

5. The Defendant No. 1 coming into contest the suit *inter alia* pleaded that the suit lands except the land under plot Nos. 216/1761 and 213 appertaining to khat No. 518 are the self-acquired properties of Late Raghunath. The husband of the Plaintiff had not contributed for acquisition of the said land. However, late Raghunath purchased two (2) acres of land at village Kurlughati and ten (10) cents of house site at Sadasivapur in the name of husband of the Plaintiff which was given to her later on the death of her husband. Stating so, the Defendant No. 1 has pleaded that the Plaintiff left the house of her father-in-law sometime in the year 2003 after knowing the sufferings of her husband from AIDS. It is alleged that after the death of her husband, the Plaintiff demanded maintenance from late Raghunath and filed a MAT Case No. 14/06 which was dismissed as Raghunath died during the pendency of the proceeding. It is further stated that late Raghunath out of sympathy had given land to an extent of two (2) acres at Kurlughati and ten (10) cents of house site at Sadasinbapur mouza besides gold and cash to the Plaintiff for her maintenance. It is stated that her husband out of his independent income had purchased the homestead land at Dandisahi recorded under plot Nos. 216/1671 under khat No. 518 and those are his

self-acquired properties. It is also stated that Raghunath being satisfied with the service of Defendant No. 1 had executed an unregistered Will on 3.5.06 in her favour bequeathing the suit land under schedule 'A' and 'B'. She therefore claimed that the said properties be kept out of purview of the partition. It is also stated that the earlier her father-in-law had executed a Will on 9.10.2002 in favour of her son in relation to the property covering Ac.2.025 decimals at Mouza-Sadasivapur. It is also stated that the said properties cannot be brought within the purview of partition.

6. On the above rival pleadings, the Trial Court framed in total six issues. First coming to answer No. 4 as to the unity of title and possession of the parties over the suit land, upon examination of evidence and evaluation of the same, finding has been returned that after Raghunath, the estate left by him having not been partitioned amongst the parties, the suit lands are liable to be partitioned. While dealing with the same, the validity of Will etc. have also been discussed and finally the following order has been passed:-

-ORDER-

“That the suit be and the same is DECREED IN PART preliminary on contest against the Defendants, but without any cost. The plaintiff is hereby held entitled to 1/3rd share from out of the suit property on partition and the parties are, accordingly, directed hereby to carve out their respective share therefrom mutually within a period of two months hence, failing which any one of them would be at liberty to present a final decree proceeding for partition of the same through the process of the Court. It is, however, made it clear that while allotting the shares of the respective parties, the two acres of agricultural land and ten cents of homestead land, as shown in Schedule 'C' and 'D' of the plaint, be adjusted towards the share of the plaintiff from out of the entire suit property taking into account the disposal and valuation thereof.”

The Defendant Nos. 1, 3 and 4 being aggrieved by the same having filed the Appeal have been unsuccessful.

7. Learned counsel for the Appellant (Defendant No.1) submitted that the Courts below have completely erred both on fact and law in holding the Will Ext.F-1 to be of no avail to these Defendant Nos. 1, 3 and 4 when the evidence on record are overwhelming on the score that Raghunath being in a fit state of health and mind had executed the said Will in accordance with law out of his own desire and volition. He submitted that without appreciating the evidence on record which clearly prove the Will Ext. F-1 as per law and as so required and there being no such suspicious circumstance surrounding the said Will, the Courts below without keeping in view the legal provisions and the principles of law governing the field as set out had no reason or justification to keep the Will, Ext. F-1 out of the arena of consideration. He therefore submitted for admission of this Appeal on the above substantial question of law.

8. Before going to dwell upon the above contention in searching out the substantial question of law if so, surfaces meriting admission of this Appeal; it may be stated that the Defendants have projected two Wills i.e. Ext.D-1 and Ext.F-1 in advancing their claim over said properties described therein. The first Will Ext. D-1 is a registered one whereas the other i.e. Ext. F-1 is unregistered. The testator in both the Wills is Raghunath Panda and he is said to have bequeathed the property described in the respective Will to the beneficiary i.e. the Defendant No.4 vide Ext. D-1 and under the next Will Ext. F-1, Raghunath had bequeathed the property described therein in favour of Defendant Nos. 3 and 4. The Trial Court has not gone to discuss anything touching the first Will Ext. D-1 as the subject matter of dispute raised by the Plaintiff

in the suit does it cover the properties in Ext.D-1. Since the property involved under Ext.D-1 is not the subject matter of the suit, the course adopted by the Trial Court is found to be well in order.

The examination now remains with regard to the unregistered Will Ext. F-1. This Will Ext. F-1 is of the year 2006. The provision of law and the legal principle set out with regard to proof a Will and finally as to its acceptance for being pressed into service are all well established and therefore, needs no further elaborate discussion. The Will is required to be proved like any other document except to the special requirement of attestation as stated under section 63 of the Indian Succession Act read with section 68 of the Evidence Act. This has to be proved by the person who is the beneficiary under the Will or who seeks to project that Will or who seeks for ultimate benefit or advantage under the same. As the Will when comes into play after the death of testator/testatrix as the case may be and its acceptance binds the whole world being a decision in rem, the beneficiary, he/she be the direct or indirect carries the initial burden of proof of showing that the testator/testatrix had executed the said Will being in a fit state health and mind and it was his own voluntary act without being influenced from any other quarter or any other pressure and thus the evidence as laid do not indicate any such suspicious circumstance surrounding the execution of the Will. The proof of attestation as provided in law is a safe guard on the above score being so made mandatory for proof of such a document.

9. In the given case, the Defendant No. 1 examining herself as D.W.4 has deposed that the said Will executed by her father-in-law had been handed over to her seven days before his death and when she says to have not informed about that document even to her counsel prior to her examination in court on 8.9.2010, the record shows that she having entered appearance in the suit of the year 2006 long prior thereto, in the

written statement reference to the unregistered Will has been made and claim on that score has been advanced. This evidence of D.W.4, in my considered view, cannot be lightly brushed aside when it is not stated or said that along with the written statement, the Will had been filed. The testator, Raghunath Panda was putting his signature everywhere. However, in the said Will Ext. F-1, his thumb impression finds place. This has again not been identified by anybody either he who has taken the thumb impression or in whose presence said thumb was put by the testator. When D.W.4 states that seven to eight months prior to death Raghunath Panda, he had an attack of paralysis and was not able to talk properly, later, she has varied the same in saying that only a week before his death, he was not able to talk. This witness is also not stating that the thumb impression as it appears on Ext. F-1 is the thumb impression of her father-in-law and the same to her appears to be having the resemblance with other admitted thumb impressions of her father-in-law appearing on other document/s. Admittedly, this witness was not present at the relevant time. Seven to eight months before the death, Raghunath was staying with this defendant No.1 i.e. D.W.4. The Trial Court has next gone to discuss the evidence of D.W.5 in detail. D.W.5 being cross-examined has admitted to have been performing the duties as the family priest in the house of Raghunath. He states to have been called by Raghunath on different occasions. Even though he claims to be present and is a witness to the Will Ext. F-1; interestingly he is not able to say the name of other witness present. He now gives a different picture that 10 to 15 street people were present at that time when the Will came into being. A new story is introduced by witness that the Lawyer had been to the place and he went away after having discussion about the deed and then returned by preparing the deed and thereafter other formalities were carried out. However, nothing is stated as to the time gap. This witness

has next admitted that Raghunath had not stated about the details of the landed properties that he intended to bequeath and instead told him the total which is also not stated by the witness. The Record of Rights of those lands covered under the Will had not been shown by Raghunath nor given to the lawyer or any one there. All these aspects have been taken care of and the evidence of those witnesses being judged from every possible angle to arrive at a satisfaction with regard to their liability and acceptance, the Courts below are found to have rightly held the Will Ext.F-1 to be of no aid to the case of the Defendants.

For all the above discussion, this Court finds absolutely no such infirmity surfacing in the said conclusion arrived at by the Courts below.

10. In the wake of aforesaid, this Court is not in a position to accept the submission of the learned counsel for the Appellant-Defendant No.1 for the admission of this Appeal.

11. Accordingly, the Appeal stands dismissed. There shall however be no order as to cost.

12. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No. 4587 dated 25th March, 2020 as modified by Court's Notice No. 4798 dated 15th April, 2021 and Court's Office order circulated vide Memo No.514 and 515 dated 7th January, 2022.

**(D. Dash),
Judge.**