

IN THE HIGH COURT OF ORISSA AT CUTTACK

FAO NO.323 OF 2021

From the Judgment/Order dated 31.08.2021 passed by the learned District Judge, Khordha at Bhubaneswar in Test Case No.44 of 2018.

Kalpana Mishra

:::

Appellant

-:: VERSUS ::-

Nirupama Mishra & Ors.

:::

Respondents

Appeared in this case by Video Conferencing Mode /

Hybrid Mode.

For Appellant

::: Mr. S.K. Sarangi,
Senior Advocate

For Respondents

::: Mr. P.K. Mishra, Advocate
(for Respondent No.1)

PRESENT :

THE HON'BLE MR. JUSTICE B.P.SATAPATHY

Date of Hearing- 06.05.2022:: Date of Order- 12.05.2022

B.P.Satapathy, J. This matter is taken up through Hybrid Mode.

2. Heard Mr. S.K. Sarangi, learned Senior Counsel appearing for the Appellant and Mr. Pradeep Kumar Mishra, learned counsel appearing for the Respondent No.1 to 4.

3. At the outset, Mr. Mishra, learned counsel appearing for the Respondents filed an affidavit duly sworn by the Respondent No.4 on behalf of all the Respondents. The same be kept on record.

4. Mr. Sarangi, learned Senior Counsel appearing for the Appellant submitted that the present appeal has been filed challenging the order dtd.31.08.2021 passed in Test Case No.44 of 2018 by the learned District Judge, Khordha at Bhubaneswar.

5. It is submitted that learned District Judge without proper appreciation of the materials palced before him while dismissing the Test Case No.44 of 2018 declined to probate the Will executed in favour of the Appellant on 16.01.2002 by one Maheswar Mishra.

6. It is further submitted that learned District Judge only on the ground that attestation of the Will is not proved held the Appellant not entitled to get the benefit and accordingly dismissed the matter. Respondent Nos.1 to 4, the contesting Opp. Parties in the aforesaid Test Case No.44 of 2018 in the affidavit filed today. Therefore, Respondent No.4 has submitted that before the learned trial Court, they filed separate affidavits declaring therein that they are no objection if the probate of the will be allowed in favour of the Appellant. The copies of such affidavits filed before the learned trial Court were also enclosed with the affidavit filed in Court today.

7. Heard learned counsel for the Parties. Perused the materials available on record. Learned District Judge while

refusing to probate the Will, held that since the material fact as to attestation is not pleaded, the evidence regarding attestation brought on record cannot be taken into consideration. Learned District Judge accordingly held that since the attestation of the Will was not pleaded and proved, the deed of Will cannot be probated.

8. It is not disputed by either of the Parties that the Will in question is a testator Will executed on 16.01.2002 by the testator Maheswar Mishra and the said Will was not only attested by attesting witness but also one of the attested witness was examined as P.W.2 and he proved the said attestation.

9. It is also not disputed that the Repsondents herein also never object or dispute the execution and attestation of the Will in question. Therefore, only on the ground that the attestation of the Will is not pleaded, learned District Judge should not have rejected the matter vide the impugned order dtd.31.08.2021.

10. Mr. Sarangi, learned Senior Counsel in support of his claim relied on a decision of this Court reported in 2014 (II) OLR 584. In the said reported judgment, this Court in Para 5 has held as follows:-

“In the probate proceeding one of the petitioners was examined as P.W.1 and one of the attesting witnesses was examined as P.W.2. The learned District Judge after examining the evidence placed before him observed that the attesting witness testified to the effect that on 3.4.2001 the deceased Sendha patra had executed the Will in favour of the petitioners-appellants while he was in good state of mind and that he executed the same without being influenced and pressurized

by anyone. It is also observed that the attesting witness stated in the Court that the testator executed the Will in presence of P.W.2 and the other attesting witness. It is also stated in the impugned judgment that the attesting witness has proved that the Will was scribed by one Nirakar Behera as per the instructions of the testator and after the contents of the Will were read over and explained and confirming that the contents were correct the testator signed it in presence of P.W.2 and the other attesting witness and thereafter the Will was presented before the registering authority, Anandapur for registration. Thus, it is found that the document put forward as Will of the deceased Sendha Patra is proved to have of such execution the testator had a sound disposing mind. However, the learned Court below has refused to probate the Will solely on the title. On that ground the learned Court below has opined that the will is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. In *Mrs. Hem Nalini Judah v. Mrs. Isolyne Sarojashini Bose*, reported in AIR 1962 SC 1471 which is relied on by this Court in *Laxmi Bai v. A. Chandravati*, 1995 AIR (Orissa) 131, it has been held that probate or letters of administration. In *Jagojoti Bose v. Bararuchi Bose*; AIR 1970 SC 29, this Court has held that probate or letters of administration are not concerned with title to the property but are only concerned with the due execution of the Will.”

11. Mr. Sarangi, learned Senior Counsel also relied on another decision of this Court reported in 2010(II)CLR 205. In the said reported decision, this Court in Para 5 has held as follows:-

“In the case of *Ishwardeo Narain Singh (supra)*, while analyzing the facts of the said case, it was observed that there is nothing in law which requires the registration of a Will and Wills are in a majority of

cases not registered at all. The Supreme Court held that to draw any inference against the genuineness of the Will on the ground of its non-registration is wholly unwarranted.

In the case of Rabindra Nath Mukherjee and another (supra), considering as to whether depriving natural heirs from succeeding to a property by execution of a Will, it was observed by the Supreme Court that this should not raise any suspicion, because the whole idea behind execution of Will is to interfere with the normal line of succession and, so, natural heirs would be debarred in every case of Will; of course, it may be that in some cases they are fully debarred and in other only partially. In the instant case, there are materials appearing on the face of the Will that the testator was neglected by all his kith and kin which by implication includes his daughter also. It is, therefore, more fortified that no suspicious circumstances can be presumed as because, the testator had only one daughter who was debarred by execution of the Will. It is well settled in law that the mode of proving the Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will in Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances, surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. (See AIR 1959 SC 443 and AIR 1962 SC 567)."

12. This Court in the reported decision in 2014(II) OLR 584 held that the Court of probate is only concerned with the question as to whether the documents put forward as the last will and testament of a deceased person was duly exhibited and attested in accordance with law and whether at the time of such execution the testator had a sound mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.

Similarly, this Court in other reported decision 2010 (II) CLR 205 held that as a Court in which a Will is sought to be probated has no jurisdiction to examine the question of title in the property under the WILL.

13. Mr. Sarangi, learned Senior Counsel also relied on another decision of the Hon'ble Apex Court reported in AIR 2005 SC 4362. In the said reported decision, Hon'ble Apex Court in Para 24 and 25 held as follows:-

“But as regards appellant Rohan Prakash, his conduct and behavior on the date of the occurrence were of highly suspicious nature. Appellant Rohan Prakash was present in the tuition class along with deceased Abhishek. Appellant Arnit Das came to the house of Prof. Banerjee at about 7.00 p.m. on 5-9-1998 and met Mrs. Rekha Banerjee and enquired about Abhishek. At that time, appellant Rohan Prakash and deceased Abhishek were attending the tuition classes. Appellant Arnit Das introduced himself as a friend of Abhishek to Mrs. Rekha Banerjee and requested to call him. Abhishek came out followed by Rohan Prakash. Shortly thereafter, PW 11 Prof. Banerjee heard the sound of firing. When Rohan Prakash wanted to go out in that direction. Although Mrs. Rekha Banerjee tried to prevent him from going out, he manage to extricate himself and went out to the place of occurrence and later gave the F.I. statement to the police. The F.I. statement given by appellant Rohan Prakash was in a way a misleading one. It is true that there was no necessity for appellant Rohan Prakash to come out of the tuition class. In the confession statement made by appellant Arnit Das, he has mentioned that appellant Rohan Prakash is one of the conspirators. Apart from the suspicious conduct of appellant Rohan Prakash on the date of the incident, there is no other evidence against him. Therefore, it is difficult to hold that there is other independent evidence to find him guilty of the murder and as there is no independent evidence against Rohan Prakash, the confession made by the co-accused Arnit Das cannot be

made as supporting evidence under Section 30 of the Evidence Act. In our view, the prosecution has not succeeded fully in proving the guilt of appellant Rohan Prakash. The independent evidence is not sufficient to prove that he has actively participated in the conspiracy. The conduct exhibited by this appellant would cast serious suspicion on him, but that by itself is not under Section 302 read with Sections 34 and 120-B IPC. In our view, appellant Rohan Prakash is entitled to get the benefit of doubt. Criminal Appeal No.736 of 2003 filed by Rohan Prakash is, therefore, liable to be allowed.

Appellant Arnint Das made his confession before the Judicial Magistrate and his confession is corroborated by other items of evidence. He had also made extra-judicial confession to PW-8 Arko Pratim Banerjee. The confession made by appellant Arnit Das was not under any inducement, threat or promise and is voluntary in nature. Therefore, it is perfectly admissible under the Evidence Act. The conviction and sentence entered against appellant Arnit Das on all counts are not liable to be interfered with. Criminal No.689 of 2003 filed by appellant Arnit Das is liable to be dismissed.”

14. It is accordingly submitted that in view of the no objection of all the contesting Opp. Parties coupled with the decision rendered by the Hon’ble Apex Court as well as by this Court, the rejection of the matter by the learned District Judge vide the impugned order is liable to be quashed.

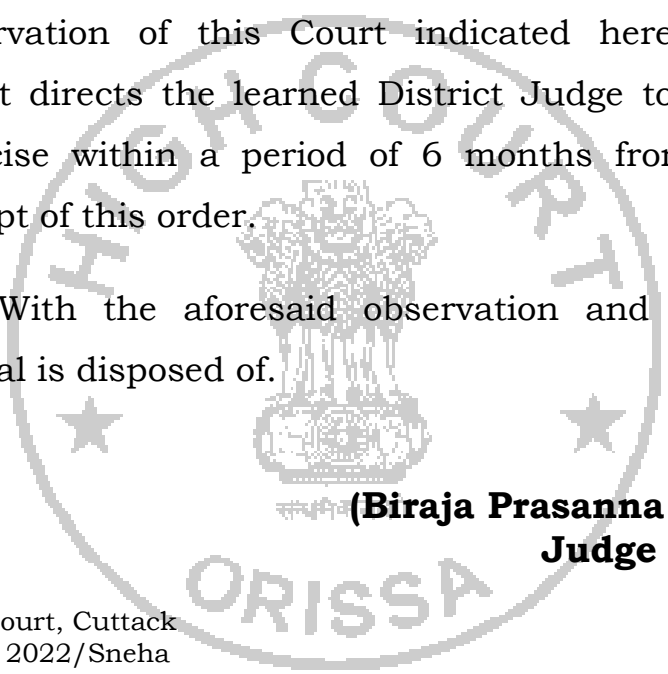
15. Heard learned counsel for the Parties at length. Perused the materials available on record.

16. Since the Will in question is a registered Will and duly attested by the attesting witness with the examination of one of the attesting witness as P.W.2, the burden of proof

to prove the Will is held to be duly and satisfactorily proved by the Appellant.

16. Accordingly, this Court is inclined to set aside the impugned order dtd.31.08.2021 passed in Test Case No.44 of 2018 by the learned District Judge, Khordha at Bhubaneswar. This Court while setting aside the said order directs the learned District Judge, Khordha to rehear the matter and decide the claim of the appellant in the light of the decisions as cited (supra) and the observation of this Court indicated hereinabove. This Court directs the learned District Judge to complete the exercise within a period of 6 months from the date of receipt of this order.

17. With the aforesaid observation and direction, the appeal is disposed of.


(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
The 12th May, 2022/Sneha