(2007) 02 GAU CK 0032

Gauhati High Court

Case No: None

Bhabananda Deka and Others	APPELLANT
Vs	
Utsab Deka and Others	RESPONDENT

Date of Decision: Feb. 28, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 2, Order 9 Rule 4

Citation: (2007) 2 GLT 774

Hon'ble Judges: Iqbal Ahmed Ansari, J

Bench: Single Bench

Final Decision: Allowed

Judgement

I.A. Ansari, J.

By the impugned order, dated 30.03.2000, passed, in Misc. (Probate) Case No. 47/1996, the learned District Judge, Barpeta, dismissed the case by refusing to grant probate. Aggrieved by the dismissal of their application for probate, the petitioners have preferred this appeal.

2. The case of the petitioners-appellants, in the probate proceeding, was, in brief, thus: Sobharam Deka''s son, Sarbananda Deka, pre-deceased his father; whereas petitioner Nos. 1 and 2 are sons of the said Late Sarbananda Deka and petitioner No. 3 his widow, petitioner No. 4 is one of the sons of Late Sabharam Deka. The opposite party to the proceeding are all sons of Late Sabharam Deka, the opposite No. 3, namely, Sri Bhogirath Deka, being one of the beneficiaries under the Will, which was executed by Late Sabharam Deka, during his lifetime, bequeathing the properties, described in the Schedule to the Will, in favour of the petitioners and opposite party No. 3. Late Sabharam Deka left his other properties in favour of his remaining heirs.

3. The respondents herein contested the probate proceeding by filing their objection, their case being, briefly stated, thus: The Will, in question, was not

executed by Sabharam Deka, for, Sabharam Deka was not mentally and physically capable of executing any Will inasmuch as Sabharam Deka had been a patient of hypertension and remained bedridden for about 10 years before his death. On a previous occasion also, the petitioners had instituted a probate proceeding in the Court of the District Judge, Kamrup, which had given rise to Misc. (Probate) Case No. 272/82 and this case was dismissed for default on 07.07.84; but suppressing this fact, the petitioners have, once again, sought for grant of probate of the said Will, the Will, in question, being a fraudulent one.

4. On the basis of the pleadings of the parties, following issues were framed:

1. Whether there is cause of action for the present case?

2. Whether the case is hit by principle of res judicata?

3. Whether the claimants have been able to establish and prove the execution and authentically of the will in question?

4. Whether the claimants are entitled to get the probate as prayed for?

5. The issue No. 2, namely, whether the case is hit by the principle of res judicata was heard as a preliminary issue and by order, dated 31.07.98, the learned District Judge held that the dismissal of the Misc. (Probate) Case No. 272/84 aforementioned would not operate as res judicata and could not have barred the institution of another proceeding seeking probate, for, the earlier case was dismissed for default and had not been adjudicated on merit. This decision remained unchallenged throughout.

6. In support of their respective cases, both the parties examined two witnesses each. Having considered the materials on record, the learned District Judge held to the effect that according to the evidence on record, the testator was not mentally and physically fit to execute the Will, the application for probate had been made after a lapse of 15 years and that on an earlier occasion also, attempt had been made to obtain probate, but having completely suppressed this fact, the present application for probate had been made. On the basis of the conclusions, so reached, the learned District Judge held that the petitioners were not entitled to obtain probate of the Will, in question, and, therefore, dismissed their application.

7. I have heard Mr. A.S. Choudhury, learned Senior Counsel, appearing on behalf of the appellants. None has appeared on behalf of the respondents.

8. While considering the present appeal, what is pertinent to point out, at the very outset, is that when a probate is resisted on the ground that the probate has been fraudulently obtained or prepared, propounder has the onus to prove that mentally and physically, the testator was fit enough to execute the will. The propounder has also the onus to prove that the will was executed by the testator at the time, when the testator was in sound state of body and mind. What is also important to bear in

mind is that the one, who resists grant of probate of a Will, which has been proved to have been executed by the testator, has the onus of showing that the Will was never executed by the testator or that at the time, the will was executed or is shown to have been executed, the testator was, mentally and physically, not in sound state of health and mind and/or that the Will obtained was a fraudulent one. In the present case, apart from contending that the Will was not executed by Sabharam Deka the respondents also contended that Sabharam Deka was not in sound state of body and mind, when the Will was said to have been executed by Sabharam Deka and, further, that the Will, in question, was a fraudulent one.

9. Bearing in mind the grounds on which the application for probate of the Will had been resisted, when I turn to the evidence on record, I notice that PW 1 (Rajeswar Deka), who is an advocate, has deposed that he completed his LL.B in the year 1973, parties to the probate proceeding are his relatives and, on the request of Sabharam Deka and as instructed by Sabharam Deka, he had prepared the Will in the year 1976. It is in the evidence of PW 1 that he had read out the contents of the Will to Sabharam Deka and Sabharam Deka had put his signatures on the Will, his signatures being Exhibit 1(1), 1 (2) and 1(3). It is also in the evidence of PW 1 that Exhibit 1(4), 1(5) and 1(6) are his own signatures. PW 1 has clarified, in his evidence, that there was another witness, namely, K.K. Choudhury, who is no more alive and that the probate application, in the present case, has been certified by him as one of the witnesses to the Will.

10. Notwithstanding the fact that the present respondents had contended, in their written statement filed in the probate proceeding, that the said Will had not been executed by Sabharam Deka, what is, now, of utmost importance to note is that the respondents did not, in the said proceeding, dispute the evidence given by PW 1 that Exhibits 1(1), 1(2) and 1(3) are signatures of Sabharam Deka. Thus, the fact that Sabharam Deka had executed the Will could not be shaken by the respondents herein. The only question, therefore, which remained to be decided is as to whether Sabharam Deka was or was not in sound state of body and mind at the relevant point of time. While considering this aspect of the case, what may be pointed out is that though Sabharam Deka was, undoubtedly, old at the time, when he had, according to the evidence of PW1, executed the said Will, nothing was elicited from the cross-examination of PW 1 to show that at the relevant point of time, Sabharam Deka was not mentally capable of instructing the petitioner No. 1 to prepare the Will nor could he (Sabharam Deka) have executed the Will. This apart, the respondents miserably failed to show that Sabharam Deka was under the influence of the appellants or that the appellants were the ones, who had such access to Sabharam that they could have got the said Will executed by Sabharam Deka by putting him under undue influence.

11. Thus, when the signatures of Sabharam Deka on Exhibit 1 (i.e., the Will) were not disputed, the question of Exhibit 1 being a forged document did not arise at all. As

already indicated above, the only question, therefore, which remained to be answered was as to whether Sabharam was mentally fit to either instruct PW 1 to prepare the will or whether Sabharam could have executed the Will knowing as to what he was executing? In this regard, it is worth reiterating that since PW 1 is the person, who had written the Will, and since it is PW 1, who has proved the signatures of Sabharam on the said Will, it was the duty of the respondents to put PW 1 to thorough cross-examination so as to sustain their objection that Sabharam was not in sound state of body and mind at the relevant point of time. On this aspect of the case, there is no pointed cross-examination of PW 1. What also needs to be carefully noted is that except offering suggestion to PW 1 to the effect that Sabharam was, for 10 years before his death, remained ill, the respondents did not cross-examine PW 1 to elicit anything from him to show that Sabharam was not in sound state of body and mind. As PW 1 had denied the suggestion that Sabharam had been ill and as there was not even a suggestion that Sabharam was of unsound mind or incapable of giving instructions to PW 1 to prepare a Will, the evidence of PW 1, which, otherwise, remained unshaken, could not have been ignored and ought not to have been ignored by the learned Court below. Situated thus, one has no option, but to conclude that when the respondents had not elicited anything to show that the evidence of PW 1 was untrue or that Sabharam was mentally unfit to instruct PW 1 to execute a Will, the learned Court below could not have, merely on the basis of the evidence given by the respondents, held that Sabharam was not mentally fit to either instruct PW 1 to prepare the Will or execute the Will.

12. Yet other two reasons, assigned by the learned District Judge, for not granting the probate are the delay in making the application for probate and the fact that the proceeding for obtaining probate of the said will was earlier initiated in the Court of the District Judge, Kamrup, and the same had been dismissed for default. While considering these aspects of the case, it is of immense importance to note that under Order DC Rule 3 of the CPC, when neither party to a suit appears, when the suit is called on for hearing, the Court may make an order that the suit be dismissed. A suit may also be dismissed, as laid down in Order IX Rule 2 CPC, when, due to default, on the part of the plaintiff to pay Court-fee or postal charges, summons have not been served on the defendant. Order IX Rule 4 makes it clear that when a suit is dismissed either for not taking of steps by the plaintiff for service of summons on the defendant or for the reason that none of the parties to the suit appeared, when the suit was called on for hearing, the plaintiff may(subject to law of limitation) bring either a fresh suit or he may apply to the Court, which has dismissed the suit, for an order to set aside the dismissal order and if he, in his application for setting aside the order of dismissal, can satisfy the Court that there was sufficient cause for his failure to take steps for service of summons or for his non-appearance, as the Court may be, the Court can set aside such an order of dismissal.

13. What clearly flows from Order IX Rule 4 CPC is that a suit, which is dismissed for default, either because of omission to take steps by the plaintiff or for

non-appearance of the parties to the suit, when the suit was called for hearing, the plaintiff has the option to either institute a fresh suit or make an application for setting aside such dismissal. In the present case, the order, dated 07.07.84, aforementioned, passed by the learned District Judge, Kamrup, in Misc. (Probate) Case No. 272/82, shows that the respondents herein already stood served with notices and it was on account of failure of both the parties to appear in the probate proceeding on the date fixed, i.e., on 07.07.84, that the application for probate was dismissed for default.

14. Two things become crystal clear from the contents of the order, dated 07.07.84, namely, (i) that the respondents herein knew about the application having been made by the present appellants-petitioners in the Court of the learned District Judge, Kamrup, and (ii) that the probate proceeding was dismissed not on merit, but for default of both the parties to appear, when the case was called for hearing. What, therefore, becomes transparent is that it was within the knowledge of the respondents herein that the said proceeding had been instituted and also that the said stood dismissed for default. In such circumstances, the petitioner-appellants could not have been held to have suppressed the fact that they had earlier filed an application for probate, which was dismissed for default.

15. In view of the fact that the probate proceeding was dismissed for default, the petitioner-appellants could have either instituted a fresh proceeding for probate or they could have applied for setting aside the order of dismissal, dated 07.07.84. In the present case, the petitioners-appellants had opted to apply afresh for probate. The proceeding for probate was, thus, maintainable in law. The prayer for probate could not have, therefore, been dismissed for the reason that there was delay in making the application for probate. When the Court had already held that the dismissal of the earlier petition did not constitute res judicata and decided to proceed with the application for probate, the application could not have been dismissed on the ground that earlier attempt to obtain probate by the petitioners had failed. There is nothing, in the evidence on record, to show that the petitioners got deliberately their earlier application for probate dismissed for default. This apart, against the finding of the learned Court below that the present suit was not barred by the doctrine of res judicata, the respondents have not filed any cross-objection in this appeal.

16. What emerges from the discussion held above, as a whole, is that the petitioner-appellants, with the help of their evidence, had proved that the Will, in question, was executed by Sabharam Deka and that at the time, when the Will was so executed, Sabharam Deka was in sound state of mind. Though Sabharam Deka was, undoubtedly, old at the relevant time, the respondents herein could not prove that he was incapable of either instructing PW 1 to prepare the Will or that he was, mentally and physically, unfit to execute the same knowing as to what he was doing. The respondents have also failed to show, far less prove, that the

petitioner-appellants had such close access to Sabharam Deka that they could have unduly influenced him and obtained the Will. The Will could not, therefore, be proved to be a fraudulent one. In the face of the facts and circumstances as indicated hereinabove, there can be no escape from the conclusion that the application for probate ought to have been allowed by the learned Court below.

17. In the result and for the reasons discussed above, this appeal succeeds. The impugned order is set aside and the prayer for probate made by the present appellants is hereby allowed. The appeal shall accordingly stand disposed of, with cost, in terms of the observations and directions made hereinabove. Send back the LCR.