

(2016) 09 CHH CK 0009

CHHATTISGARH HIGH COURT

Case No: Miscellaneous Appeal No. 6 of 2006.

Awadhesh Pratap Singh, son of
Shri Gajadhar Singh, aged about
55 years, Resident of Chiruldih
Ward No. 2, Raipur, Tahsil and
District Raipur - Appellant
@HASH Ashok Upadhyay son of
Shri Rampal Upadhyay, aged
about 20 years, resident of
Karbala para, Raipu

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 16, 2016

Acts Referred:

- Succession Act, 1925 - Section 222, Section 244

Citation: (2016) 168 AIC 367 : (2016) AIR(Chhattisgarh) 172 : (2017) 1 CGLJ 173

Hon'ble Judges: Shri Deepak Gupta, CJ.

Bench: Single Bench

Advocate: Shri G.D. Vaswani, Advocate, for the Appellant; Shri Vikram Dixit, Advocate, for the Respondent No. 1; Shri Narendra Kumar Vyas, Advocate, for the Respondent No. 2

Final Decision: Dismissed

Judgement

Shri Deepak Gupta, C.J. - This appeal has a long and chequered history. One will (Exhibit P/1) was executed by one Smt. Thakur Dei Bai widow of Late Shri Thakur Prasad Sharma in favour of Ashok Upadhyay-Respondent No. 1, son of Shri Rampal Upadhyay. This will is purported to be executed on 05.03.1990 whereby the testator has bequeathed her entire property in favour of legatee-Ashok Upadhyay. It is not disputed that Ashok Upadhyay was born in 1977 and at that time when this will was executed, he was a minor. Smt. Thakur Dei Bai died on 05.04.1990 soon after execution of the will. Thereafter, Ashok Upadhyay through his father Rampal

Upadhyay filed a petition under Section 276 of the Indian Succession Act, 1925 (hereinafter called "the Act") for grant of probate of the will executed by Thakur Dei Bai on 05.03.1990. It is not disputed that even at the time this petition was filed, he was a minor.

2. This petition for grant of probate was rejected by the Trial Court on two grounds, one, that the Petitioner had not given the details of all the immovable properties and probate had been prayed only in respect of movable properties and secondly, two rival wills had been set up, one by Appellant herein and one by Respondent No. 2-Laxmi Narayan Dev Sthan Prabandhak Committee, who were non-applicants before the Trial Court. Ashok Upadhyay by that time had turned major and he himself filed an appeal being Miscellaneous Appeal No. 794 of 2001 before this Court. This appeal was disposed of on 22.06.2005 and though this Court held that there was a defect in the petition for grant of probate inasmuch as non-mentioning of all the properties was an improper act, the Court went on to hold that this fact was not sufficient to entail dismissal of the application for grant of probate and that the probate Court should have asked the Appellant to furnish detailed particulars. With regard to second objection, this Court, after referring to the judgment of the Apex Court in **Ishwardeo Narain Singh v. Smt. Kamta Devi & Others (AIR 1954 SC 280)** held that the probate Court had nothing to do with the title of the property but is only concerned with the question as to whether the document put forward is the last will and executed according to law. Thereafter, this Court made reference to the judgment of Madhya Pradesh High Court and Sections 213 and 214 of the Act and held that though it is not necessary to seek probate but the executor is entitled to seek probate if he so desires and there is no restriction in granting probate for both the properties together. The appeal was disposed of in the following terms:

"12. The appeal is partly allowed, the impugned order passed by the Court below is set aside and the case is remanded back with a direction to decide that application filed by the appellant under Section 276 of the Indian Succession Act on merit in accordance with law. "

3. After remand, the probate application was allowed and the will set up by Respondent-Ashok Upadhyay was held to be duly executed. This order is under challenge before this Court.

4. Shri Vaswani, learned counsel for the Appellant basically raised three issues, (i) minor cannot be an executor in a will; (ii) a minor cannot apply for grant of probate, and; (iii) the application for grant of probate was itself misconceived and therefore, no order can be passed at a later stage even if the minor has attained majority. It was also urged that though the legatee has been termed as an executor in terms of will, nothing was to be done by him and therefore, his appointment as executor is only an ornamental language and nothing more.

5. On the other hand, Shri Vikram Dixit, learned counsel for the Respondent No. 1 submits that even if there be some error at the time of filing of the execution petition, that irregularity is removed due to the fact that Ashok Upadhyay attained majority in the meanwhile and this Court had passed an order after Ashok Upadhyay had attained majority remanding the case back to the trial Court. He submits that the probate has rightly been granted and this order could not be interfered with by this Court.

6. Shri Vyas, learned counsel for the Respondent No. 2 submits that in pursuance to another will of Smt. Thakur Dei Bai all the properties have already been registered in the name of the Trust and therefore, the will has been given effect to and the properties are in possession of the Trust.

7. Section 244 of the Act reads as follows:

"244. Administration, during minority of sole executor or residuary legatee.-When a minor is sole executor or sole residuary legatee, letters of administration, with the Will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the Will shall be granted to him."

8. The opening word of this Section clearly envisages that a minor can also be the sole executor of a will. The opening words of this Section are "when a minor is sole executor or sole residuary legatee" and therefore, the Act itself envisages that a minor can be appointed as executor. The reason behind this is not far to seek. A person may execute a will at a young age. He may appoint his minor son or daughter as the executor expecting that he will live a long life. The will comes into operation only after death of the testator. No one is sure about his /her death. Therefore, a minor can be appointed as an executor in terms of Section 244 of the Act. However, Section 244 itself makes it clear that when the minor is the sole executor, no probate can be granted in his favour but only letters of administration can be granted in favour of the guardian of the minor with the will being annexed thereto. When the minor attains majority and not before that, probate of will shall be granted to the executor/legatee. In this case, reading of the will shows that the testator had appointed Ashok Upadhyay as the sole executor.

9. It is urged by Shri Vasvani that the sole executor was also sole legatee under the will and nothing was to be done by him and therefore, his appointment as sole executor is meaning less. I am unable to agree with this submission of Shri Vaswani. Even in a case where there is only one legatee and all the properties goes to the legatee and nothing further is required to be done, it is the option of the testator whether to appoint executor or not. It is not necessary that the executor in all cases must be the legatee. Sometimes, persons who are not beneficiaries under the will are also appointed and can be appointed as executors. The work which the executor is to do is to deal with the estate of the deceased in such a manner that the last wish

of the testator as expressed in his/her will is given effect to in letter and spirit. Even when there is one legatee, the testator may leave behind debts. It is the duty of the executor to discharge such debts and then make payment of the remaining property of the deceased to the sole beneficiary under the will. Once the testator has appointed an executor, it is neither for the Court nor for any other person to say that the executor has not been appointed or that appointment of the executor is meaningless.

10. That brings us to the last question as to whether the Court could have granted probate in favour of the executor-Ashok Upadhyay in view of the fact that he was a minor at the time of filing of the petition for grant of succession certificate. There can be no manner of doubt that the application for grant of succession was not property constituted when it was filed. However, even on the basis of this very document, the Court could have granted letters of administration in favour of the guardian of the minor and it was not necessary to file separate petition for grant of letters of administration. One cannot also ignore the fact that the executor attained majority in 1995. The case was decided against him on 18.10.2001 and thereafter, he filed an appeal before this Court. That appeal was entertained by this Court and when that appeal was heard, no objection was raised by the present Appellant that no probate can be granted in favour of Ashok Upadhyay. This Court remanded the matter which would lead to a prima facie conclusion that this Court felt that the probate Court only has to look into the application on merits but not on the question whether the executor was minor or major when the probate was granted. Ashok Upadhyay had already turned into a major. He was almost 28 years old at that time. Therefore, even if there was any irregularity in the application, by passage of time that irregularity has been cured as by the time probate was granted, the executor had become major.

11. As far as merits are concerned, the probate Court is only to decide whether the will was validly executed or not. It does not decide the question of title. Whether it is the trust or the executor or any other person who is legally entitled to the properties will have to be decided by the competent civil Court when the matter is raised before it. However, in view of the fact that the will was executed by Smt. Thakur Dei Bai in favour of Ashok Upadhyay, he was entitled to grant of probate.

12. In view of the above discussion, the appeal is dismissed.