

(2018) 01 GAU CK 0130

Gauhati High Court

Case No: 7 of 2009

SMTI. REKHA DAS
CHANDA

APPELLANT

Vs

SMTI. REBA DEY
BASUMATARY

RESPONDENT

Date of Decision: Jan. 5, 2018

Acts Referred:

- Succession Act, 1925, Section 299, Section 295, Section 281 - Appeals from orders of District Judge - Procedure in contentious cases - Verification of petition for probate

Citation: (2018) 01 GAU CK 0130

Hon'ble Judges: Kalyan Rai Surana

Bench: Single Bench

Advocate: A T SARKAR, B U LASKAR, A K HUSSAIN, J. PAYENG, M. BASUMATARY

Final Decision: Allowed

Judgement

1. Heard Mr. B.U. Laskar, the learned counsel for the appellant as well as Mr. J. Payeng, the learned counsel for the respondent.

2. This appeal under Section 299 of the Succession Act, 1925 is directed against the impugned judgment and order dated 27.05.2009, passed by

the learned District Judge, Hailakandi in Misc. (Probate) Case No. 41/2007, thereby allowing the probate of the Will of Late Abala Bala Dey.

3. The respondent was the petitioner in the said probate case. As per the said petition, the testatrix, was a Hindu and that her husband had

predeceased her, having died on 15.09.1998. At the time of her death, the testatrix had left behind two daughters, who are the litigating parties in

this appeal. It was stated in the probate petition that the land measuring 7 katha 12 chattak out of land measuring 11 katha 12 chattak was

bequeathed to the respondent, who is the propounder of the Will, i.e. the beneficiary as well as the executor of the will. The said probate petition

was filed on 11.04.2007. The appellant contested the case by filing a written statement. It was stated that the petition was barred by limitation and

that the will was a forged and void document and it was denied that the will was executed by her mother.

4. In support of her case, the respondent-petitioner examined six witnesses. However, the appellant did not adduce any evidence. As per order

dated 07.01.2009, the learned District Judge, Hailakandi has recorded the submissions made by the learned counsel representing the respondent

that the respondent would not adduce any evidence. The learned trial court had framed two questions to be determined in the case

i. Whether the present petition is maintainable in the present form and barred by the law of limitation?

ii. Whether the probate of the said will can be granted in favour of the petitioner as prayed.

5. Both the issues were taken up together. It was held that the petition was maintainable. It was held that the testatrix had died on 15.09.1998 and

the present case was filed after the lapse of nine years. However, it was held that a petition for grant of probate or letters of administration, the

right to apply accrues everyday so long as the will remains un-probated. Relying on the case of AIR 1990 NOC 139 (Madras), it was observed

that the Hon"ble Madras High Court had held that ""the limitation question will not arise in such a petition or application for probate or letters of

administration.

6. The respondent examined the following witnesses - herself (PW.1), Smt. Chapalabala Debroy (PW.2), Sri Sandip Nath (PW.3), Sri Tarun

Kumar Dey (PW.4), Sri Subrata Chakraborty (PW.5), and Smt. Radhika Ranjan Ghose Adhikari (PW.6). The following documentary evidence

was exhibited by her, viz., Death Certificate of the testatrix (Ext.1), Registered Deed dated 04.03.1988 (Ext.2), Registered Will (Ext.3), Signature

of the testatrix [Ext.3(1) and 3(2)], Signature of attesting witness [Ext.3(3), 3(4) and 3(5)], Signature of writer of Will [Ext.3(6) and 3(7)].

7. The PW.1 had deposed that the appellant, who is her sister had married thrice without any divorce and because of such unsocial activity, her

mother had executed her Will on 09.02.1983 at Hailakandi Sub-Registrar Office in respect of 11 katha 12 chattak of land and she was appointed

as executor. Subsequently, due to her economic crisis, the testatrix had sold four katha land out of 11 katha 12 chattak land to two persons on

09.02.1988. In her cross-examination, PW-1 had stated that there are two houses on her mother's land and she was staying in one house and her

sister along with her daughter are staying as tenant in another house for which there was not rent agreement and that before filing the said case,

their electricity supply had been disconnected by her. She had denied that Ext.3 was a fabricated document and that Ext.3(1) and Ext.3(2) were

not the signatures of the testatrix. PW-2, who is the elder sister of the testatrix, had stated that her husband Rajendra Chandra Debroy was a

witness in that will and the said witness had proved the signature of the testatrix vide Ext.3(1) and 3(2), and the signature of her husband vide

Ext.3(3). In her cross-examination, she had stated that the will was prepared in the dwelling house of the petitioner and that the testatrix had told

her about the execution of the Will and her daughter, the petitioner had the knowledge about the execution of the will. PW-3 proved the signature

of the father Jyotish Chandra Nath vide Ext.3(4), who was an attesting witness. In his cross examination, PW-3 could not say where the Will was

executed, or the number of witnesses who were present at the time of execution of the said Will (Ext.3). PW-4 had proved the signature of his

father, Late Motilal Dey vide Ext.3(5) and Ext.3(8), who was an attesting witness. In his cross examination, PW-4 had stated that he had no

personal in which place and when the Ext.3 was written and prepared. He could not say whether his father had gone to Court and put his signature

on Ext.3. The PW.5 had stated that the Will (Ext.3) was written by his brother Shyamal Chakraborty, a Mohorar and his signature were proved

vide Ext.3(6) and Ext.3(7). In his cross examination, PW-5 had stated that at the time of execution of Ext.3, he was not present and that he cannot

say who put their signatures on Ext.3 at the time of execution. He also could not state who had executed Ext.3 in favour of whom. The PW.6

proved the registration of the Will by stating that the contents of the Will (Ext.3) was duly entered in the Volume Book No. 1/1949 pg. No. 198 to

203 dated 07.01.1983 and the said Will was executed by the testatrix in favour of the respondent and that the will was executed in the presence of

witnesses, namely, Rajendra Chandra Debroy, Jyotish Chandra Nath and Motilal Dey and that the writer of the will was Shyamal Chakraborty.

8. In the absence of any evidence from the appellant, it was held that absolutely no suspicious circumstances surrounded the execution of the Will.

Accordingly, the probate petition was allowed.

9. The learned counsel for the appellant had submitted that there was no explanation for the inordinate delay in the filing of the probate petition.

Moreover, there was a gross procedural irregularity in this case because on contest of the case by the appellant, the petition was not converted

into suit. It is further submitted that in her cross-examination, PW-2 had specifically stated that the Will was prepared in the house of the petitioner

and that the petitioner had the knowledge of the Will. It is also submitted that for the purpose of granting probate of the Will, it was required to be

pleaded and proved that the testatrix had signed the will in the presence of the attesting witnesses and the attesting witnesses also signed in the

presence of the testatrix and that the said fact was not proved by any of the six witnesses examined by the respondent. It is also submitted that an

application for probate must be filed within three years of the death of the testator. In this regard, the learned counsel for the appellant has relied on

the cases of (i) Kamakhya Prasad Gupta and anr. Vs. Jibon Lal Gupta, 2011 (1) GLT 435, (ii) Narayan Chandra Mandal Vs. Asha Mandal and

Ors, 2015 (3) GLT 65, and (iii) The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, (1976) 4 SCC 634 . While in the case of

Kamakhya Prasad Gupta (supra) and Narayan Chandra Mandal (supra), it was held that probate petition must be filed within 3 years from the

death of the testator, in the case of The Kerala State Electricity Board (supra), it has been held that the District Judge acts as a Civil Court and, as

such, Article 137 of Schedule to Limitation Act applies. It is submitted that as the Will was kept secret for 14 years, it establishes that the will was

surrounded by suspicious circumstances. In this regard, the learned counsel for the appellant places reliance on the case of Pomi Bora Vs. Tulai

Hazorika and Ors., 2011 (1) GLT 75.

10. Per-contra, the learned counsel for the respondents submits that the propounder had no knowledge about the execution of the Will as the said

Will was kept in a trunk with some other documents. It was stated in the cross-examination that just before her death her mother had disclosed

that she had executed a Will in her favour. The PW-1 had stated that she was not aware who took her mother to Sub-Registrar office for

registration of the will. It is submitted that the starting point of limitation should be considered from the date when the respondent got the

knowledge of the Will. It is further submitted that in the case of Kamakhya Prasad Gupta (supra), this Court had relied on the case of Kunvarjeet

Singh Khandpur Vs. Kirandeep Kaur and ors., (2008) 8 SCC 463 (para 15), but the ratio decided in the said case was inadvertently not brought

to the notice of this Court. Paragraph 15 of the said case of Kunvarjeet Singh Khandpur (supra) is quoted below:-

15. Similarly reference was made to a decision of the Bombay High Court in Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani [AIR 1983

Bom 268]. Para 16 reads as follows: (AIR p. 270)

16. Rejecting Mr Dalpatrai"s contention, I summarise my conclusions thus-

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession

certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a

continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust

exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the

deceased's death;

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates.

Conclusion (b) is not correct while Conclusion (c) is the correct position of law.

11. By relying on the said case of Kunvarjeet Singh Khandpur (supra), it is submitted that the judgment of this Court in the case of Kamakhya

Prasad Gupta (supra), which is followed in the case of Narayan Chandra Mandal (supra) may be regarded as a judgment per-incurium. It is also

submitted that the case of Kunvarjeet Singh Khandpur (supra) was also followed in the subsequent case of Krishan Kumar Sharma Vs. Rajesh

Kumar Sharma, (2009) 11 SCC 537.

12. Therefore, the points of determination which arises for consideration of this Court in this appeal are as follows:-

- i. Whether the petition for probate was maintainable and whether the said petition was barred by limitation?
- ii. Whether the execution and attestation of the Will has been proved in accordance with law?
- iii. Whether any suspicious circumstances exist to dispute the genuineness of the Will?

13. On non conversion of probate petition to a suit:

a. In the present case it is seen that the appellant had filed her objection to the grant of probate and, as such, the case became a contentious one,

as such, the petition ought to have been converted into a regular suit as per the provision of Section 295 of the Succession Act, 1925.

b. Ideally in a probate case, first the caveatable interest is required to be determined as per the provisions of Section 284 to 286 on the said Act.

Nevertheless, the learned Trial Court had permitted the appellant to file her written objection against the probate petition. The appellant was also

allowed to cross-examine all the PWs and also give opportunity to the appellant to lead her evidence, but such opportunity was declined by the

appellant as reflected by order dated 07.01.2009. Therefore, in the present case in hand the said procedural irregularity of not converting the

petition to a suit as required under Section 295 of the Succession Act, 1925 is found to have not caused any prejudice to the appellant.

14. On Point of determination No.(i):

a. In this case, there is no pleading in the probate petition about the date of discovery of the Will (Ext.3) by the respondent. In the probate petition,

it was not the pleaded case of the respondent that the said Will was lying in a trunk and that prior to discovery of the said Will, she had no

knowledge about the Will. It is the specific statement of the PW-2 that the Will was prepared at the house of the respondent and that the testatrix

had informed the propounder about the Will and that the propounder had the knowledge of the Will. As per the evidence of the propounder (PW-

1), her age was 25/26 years. Therefore, it is not believable that the respondent-propounder would not be aware of the Will (Ext.3) by which her

mother had bequeathed her land to the propounder by not giving any share of the said land to the appellant.

b. The respondent- propounder (PW-1) had categorically stated in her cross examination that ""Just before her death, my mother disclosed that she

had executed a Will in my favour."" Therefore, it is unbelievable that the testatrix would not disclose to the propounder that the Will was made by

way of a registered Deed.

c. The plea of the propounder (PW-1) in her evidence to the effect that the said Will (Ext.3) was lying in the trunk with some important documents

is found to be beyond the pleadings. It is unbelievable that the respondent will not take stock of the belongings left behind by her mother, i.e. the

testatrix, even after becoming aware of execution of a Will in her favour.

d. In the case of Kashi Nath V. Jagannath, (2003) 8 SCC 740 as well as in the case of Ram Sarup Gupta V. Bishun Narain Inter College, (1987)

2 SCC 555, it has been held that no party can lead evidence beyond pleading. Although in the case of Ram Sarup Gupta, it has been held that

pleading should have liberal construction. However, in the present case in hand there is a total absence of any pleadings by the respondent-

propounder to explain her reasons for approaching the Court for grant of probate after 14 years from the date of execution of the Will and 9 years

after the death of the testatrix.

e. Coming to the cited case of Kunvarjeet Singh Khandpur (supra), it is observed that in paragraph 14 thereof, the ratio has been laid down that

Article 137 of the Limitation Act, 1963 is attracted and in this regard, the case of Kerala SEB (supra) was followed. A perusal of paragraph 15(b)

read with paragraph 16 of the said case of Kunvarjeet Singh Khandpur (supra), as quoted above, would show that conclusion (b) is not correct,

meaning thereby that ""under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted"", was not

the correct conclusion.

f. In the case of Kunvarjeet Singh Khandpur (supra), the case for grant of Letter of Administration was filed, which is not the case in hand,

because in the case in hand, the petition for grant of probate had been filed by the executor. Thus, unlike a case of grant of Letter of

Administration, no duty or trust was created or was in existence, but the private right of the executor was the matter in issue and, as such, this

Court is bound by the ratio laid down by this Court in the case of Kamakhya Prasad Gupta (supra), which is followed in the case of Narayan

Chandra Mandal (supra). Under no view of the matter, the said two authority can be regarded as a judgment per incuriam, and the said contention

of the learned Counsel for the respondent is rejected.

g. Thus, this court finds that the petition for grant of probate was not maintainable as the same was barred by limitation as prescribed under Article

137 of the Schedule to the Limitation Act, 1963.

h. The point of determination No.(i) is thus answered in the negative and in favour of the appellant.

15. On Point of determination No.(ii):

a. In this context, it is seen that the Will is required to be proved in accordance with the provisions of Section 67 and 68 of the Evidence Act,

1872, i.e. by proof of signature and handwriting of person alleged to have signed or written the document produced. However, the provision of

Section 69 of the Evidence Act, 1872 comes to the aid of the party when no attesting witness is found. In this regard, as the attesting witness and

the scribe were all dead, the respondent had examined (i) PW-2, who was the wife of Late Rajendra Chandra Debroy, an attesting witness, (ii)

PW-3, who was the son of Late Jyotish Chandra Nath, an attesting witness, and (iii) PW-4, who was the brother of Late Motilal Dey, the scribe.

Thus, the signatures of the two attesting witnesses and the scribe were duly proved.

b. Moreover, as per the provisions of Section 281 of the Succession Act, 1925, the attesting witness is required to verify the petition for grant of

probate, if such witness is procurable. Thus, when both the attesting witnesses are dead, the requirement of compliance of Section 281 becomes

otiose.

c. Thus, subject to the finding in respect of the point of determination No.(i), the execution and attestation of the Will is found to have been proved

in accordance with law and, as such, the point of determination No.(ii) is answered in the affirmative and against the appellant.

16. On point of determination No.(iii):

a. While discussing point of determination No. (i), it has been found that the respondentpropounder had admitted in her cross examination that just

before the testatrix died on 15.09.1998, the testatrix had informed the respondent about the Will dated 09.02.1983, by which property was

bequeathed to her. The probate petition was filed on 11.04.2007, i.e. 9 years after the death of the testatrix.

b. In her cross examination, the respondent- propounder has admitted that there were two houses in the property of the testatrix, and in one of the

house the respondent was residing and in the other house the appellant was residing with her daughter, though claimed as a tenant. Therefore,

when the testatrix if found to have dis-inherited the appellant on the ground of her alleged unsocial behaviour, neither the testatrix, nor the

respondent would have inducted the appellant as a tenant, and thereby allow the appellant to reside in the property of the testatrix.

c. It has been further admitted that before filing of the probate case, the respondent had disconnected electricity connection of the appellant. In this

regard, no dates have been mentioned by the respondent in her petition or in her evidence- on- affidavit.

d. The testatrix died on 15.09.1998. As per the case projected by the respondent in her evidence, she was not aware of the Will until it was found

in a trunk 9 years after the death of the testatrix. However, the respondent- propounder had not led any evidence to show that upon the death of

the testatrix, any attempt has been made by the parties to mutate the land in their respective names as the legal heirs of the testatrix.

e. There is a total lack of any pleadings or statement in the evidence- on- affidavit that the Will was executed voluntarily or that at the time of the

execution of the Will, the testatrix was in sound health and disposable mind.

f. All these leads to inference about the existence of suspicious circumstances.

17. As a result of the discussions above, by following the ratio as laid down by the Hon"ble Apex Court as well as by this Court in the case of (i)

Kunvarjeet Singh Khandpur (supra), (ii) Krishan Kumar Sharma, (iii) Kamakhya Prasad Gupta (supra), and (iv) Narayan Chandra Mandal

(supra), this Court is of the considered opinion that the petition for grant of probate was barred by limitation as prescribed under Article 137 of the

Schedule of the Limitation Act, 1963. Hence, the appeal stands allowed. Resultantly, the impugned judgment and order dated 27.05.2009, passed

by the learned District Judge, Hailakandi in Misc. (Probate) Case No. 41/2007 is set aside by dismissing the said petition.

18. The parties are left to bear their own cost.

19. Return back the LCR.