

Susanta Kumar Choudhury and anr. Vs. Birendra Kumar Deb Roy and ors.

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Court : Guwahati

Decided On : May-02-1996

Judge : N. Surjamani Singh, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rule 4(4)

Appeal No. : F.A. No. 17 of 1989

Appellant : Susanta Kumar Choudhury and anr.

Respondent : Birendra Kumar Deb Roy and ors.

Advocate for Def. : A.M. Lodh, Sr. Adv., H.K. Bhattachajee, P. Deb Roy and D.R. Choudhury, Adv.

Advocate for Pet/Ap. : S. Deb, Sr. Adv. and A.C. Bhowmik, Adv.

Disposition : Appeal dismissed

Judgement :

N. Surjamani Singh, J.

1. It is admitted by the learned counsel of both the parties that the appellant No. 2 Dr. P.K. Choudhury and the respondents Nos. 2 and 4, namely, Shri Nirmalendu Ghosh Choudhury and Shri Mahendra Ghosh Choudhury and the pro-forma respondent No. II Shri Swandip Kumar Choudhury had died. From the report of the

Process Server submitted on 23-7-1990; it has been revealed that the notices upon the respondents Nos. 2 and 4 could not be served as the said respondents were no longer alive at the relevant time when the process server visited the places where the respondents Nos. 2

& 4, resided. Now, the sole question issues arises as to whether this appeal is abated or not. Before entering into the merits on this particular issue, it will be pertinent to know the facts of this case. The facts of the case in a short compass are as follows :

2. The present appellant No. I Shri Susanta Kumar Choudhury and the appellant No. 2 Dr. Pradip Kumar Choudhury (now deceased-- filed a petition dated 29-6-1984 under Section 276 of the Indian Succession Act, 1925 in the Court of the District Judge, West Tripura, Agartala for grant of probate of the last WILL and testament dated 10-2-1968 said to have been executed by one late Satyendra Kumar Dutta Choudhury son of Late Joykumar Dutta Choudhury a resident of Deshabandhu Chittaranjan Road, Shibnagar, Agartala P.S. East Agartala, West Tripura District who died on 27-1-1970 at G.B. Hospital, Agartala leaving at the time of his death the properties described in the said WILL. The deceased was a bachelor and he by the said WILL bequeathed and devised all his movable and immovable properties including chosen-in-action and trade marks and patent rights unto the appellants (petitioners in Misc. (Probate) 6 of 1984 and one Shri Susanta Choudhry, the pro forma respondent No. 11 jointly as trustees of his said estate for the purpose of establishing and maintaining a Home for poor or orphan boys and girls or children of poor persons of the Hindu Society , or un-attached children. Under the said WILL the said trustees i.e. the appellant Nos. 1, 2 and pro forma respondent No. II shall be entitled to convert all the properties and the assets of late Satyendra Kumar Dutta Choudhury into any kind of security or other assets and keep the same invested in such securities as they deem fit in order to carry out the purposes of the trust!

3. In the year 1979 the Respondent No. 1 and others instituted Title Suit No. 28 of 1979 in the Court of the Subordinate Judge against Sasanka Mohan Dutta Choudhury (now deceased) and his legal representatives and others for

declaration of their over the lands i.e. the properties involved in the said will and for khash possession by evicting the defen-

dants there from. On ascertaining the factum of the filing of T. S. No. 28 of 1979 in the Court of the learned Subordinate Judge on 30-4-1984 the present appellant Nos. 1 and 2 (plaintiffs) filed an application on 2-5-1984 under Order 1, Rule 10(2) and Section 151 of C.P.C. for adding them as party in the said suit. As the learned Additional District Judge by his order dated 28-5-1984 rejected the prayer of the appellants for being added as parties to that suit, the appellants have been constrained to file the petition for probate by the said WILL under Section 276 of the Indian Succession Act, 1925, in the Court of the learned District Judge, West Tripura, Agartala in the prevailing circumstances as stated above.

4. The said petition for probate of the WILL was resisted by the present respondent No. 1 and others by filing written statement. In the said written statement the respondent No. 1 and the others denied the execution of the said WILL by late Satyendra Kumar Dutta Choudhury. The Opposite parties No. (i) and (j) raised objection by stating that they are in exclusive possession of the movable properties described in the schedule of the petition and that it was to be the full knowledge of late Satyendera Kumar Dutta-Choudhury and the people of his neighbourhood. The defendants in their written statement stated that late Satyendra Kumar Dutta Choudhury never executed the said WILL during his life time either on 10-2-1968 or at any time, he had never expressed his opinion to any body for bequeathing his properties by a WILL and that alleged WILL dated 10-2-1968 is a forged, fabricated and interpolated, anti dated deed created in the name of the appellants and pro forma respondent No. 11 in collusion with the Opposite party Nos. 14(i) and 14(j) of the said petition. The Opposite party further stated that there is no attestation in the WILL as required under Section 63(c) of the Indian Succession Act, and, as such, the said will is not a genuine document. The Opposite party further raised a serious objection by stating that if the alleged WILL dated 10-2-1968 ever existed on and from 10-2-1968, there is no earthly reason for the petitioners not to disclose this fact,

after death of the Testator & to take over possession of the properties bequested by such WILL and not to pray for probate of the unregistered WILL before the District Judge during the last 14 years. The petitioners did not make any attempt to mutate their names in the record of rights in respect of the said properties during this period and they did not pay revenue of the said immovable properties which had been treated as personal properties of the Opposite party Nos. 14(a) to 14(h) by inheritance for more than 12 years to the knowledge of the petitioners who are residents of town of Agartala.

5. The original/trial Court i.e. the learned District Judge, West Tripura, Agartala framed as many as 5 issues on the pleadings of both the parties for just determination of the real points in controvercies between the parties. The said issues are reproduced as hereunder :

'(1). Did Satyendra Kumar Dutta Choudhury execute the WILL during his life time on 10-2-1968 in presence of the attesting witnesses of the alleged will with his free WILL and consent ?

(2) Did the witness see Satyendra Kumar Choudhury to sign the WILL and did they attest the WILL in presence of Satyendra Kumar Dutta Choudhury?

(3) Is the WILL a legal, valid and genuine deed or is it a fabricated and forged, interpolated and anti-dated deed created in collusion with O.P. Nos. 14(i) and 14(j)?

(4) In the WILL dated 10-2-1968 the last WILL of late Satyendra Kumar Choudhury and was it intended to operate as a last WILL of the testator?

(5) Are the petitioners entitled to get a ' decree for probate of the WILL ?'.

6. After hearing the parties, the learned District Judge, West Tripura, Agartala dismissed the petition and held that the WILL executed by late Satyendra Kumar Dutta Choudhury on 10-2-1968 was not legally executed, by his judgment and order dated 10th August, 1989 passed in Misc. (probate) 6 of 1984. The District Judge in paragraphs Nos. 6 and 7 of his judgment, he made the

following observation:

'6. Section 63 of the Indian Succession Act prescribes that the WILL is required to be attested by two or more persons, each of whom has seen the testator sign or affix his marks to the WILL or has seen some other-persons sign the WILL in the presence and by the direction of the testator and that each of the witnesses has signed the WILL in the presence of the testator. Unless the requirements of Section 63 of the Indian Succession Act are proved, no will can be said to be genuine or duly proved where the opposite parties have challenged the legality, validity and existence of the WILL. Apart from the fact that neither of the petitioners is executor of the WILL for which the probate has been asked for, the petitioners have failed to prove that the deceased Satyendra Kumar Dutta Choudhury executed the WILL in presence of the attesting witnesses and that they attested the WILL in presence of the testator. There is no evidence on record that the WILL executed by the testator on 10-2-1968 was made with his free WILL and consent. Since the execution of the WILL, its validity and genuineness has been challenged by the opposite parties it is incumbent upon the petitioners to prove all the ingredients of Section 63 of the Indian Succession Act. I answer both the issues in the negative.

7. Issue No. 3:-- The petitioners have failed to prove that the WILL was genuine and valid. But I refuse to accept that it was created in collusion with the O.P. No. (i) and (j) for the reasons that they being the sons of the attesting witness Sasanka Mohan Dutta Choudhury. In para 3 of the written statement it is candidly stated that they totally deny the existence of any alleged WILL and seriously challenges the legality, validity, propriety and genuineness of the alleged WILL. Besides, hotly they contested the application seeking granting of probate and they cross-examined all the witnesses who appeared for the petitioners. I hold that the WILL is not a genuine deed, for the petitioners have failed to prove the requirements of Section 63 of the Indian Succession Act, But I refuse to accept that it was created in collusion with the O.Ps.

Nos. (i) and (j). This issue is thus disposed of.'

7. Shri A. M. Lodh, learned senior counsel for the respondents submits that the present appeal abates as a whole as the respondents Nos. 2 and 4 died and their legal representatives were not brought on record. Moreover, the appellant No. 2 as well as the pro forma respondent No. 11 also died and their legal representatives were also not brought on record. The appellant No. 1 did not take any steps for bringing legal representatives of the respondent Nos. 2 and 4 as well as the deceased appellant No. 2 and the pro forma respondent No. 11 till today without assigning any reason or without filing any application in that regard.

8. On the other hand, Shri S. Deb, learned senior counsel for the appellants submits that only the respondent No. 1 i.e. the O.P. No. 1 in the Court below contested the suit by filing the written statement through his constituted attorney namely, Sachindra Chandra Dutta. But the other O.P. Nos. 14(b) to 14(h), the respondents did not contest the suit and that they did not appear before the Court: In this connection Shri S. Deb drew my attention to the written statement filed and presented by Shri Sachindra Chandra Dutta, the constituted attorney of the respondent No. 1 On 30-6-1986. In that written statement only the said Sachindra Chandra Dutta signed on behalf of the Opposite party No. 14(a) Sri Birendra Kumar Deb Roy, the present respondent No. 1. Even though the written statement was said to have been presented and filed for and on behalf of the other O.P. Nos, 14(b) to 14(h). A reference is also made by Sri Deb, learned senior counsel for the respondent to the orders dated 7-10-1985 and 30-6-1986 passed by the learned trial Court showing the factum of entering the appearance of the O.P. No. 1 through his constituted Attorney, namely, Sri Sachindra Chandra Dutta as well as filing of written objection for and on behalf of O. P. Nos. 14(a), 14(b) to 14(h). Shri Deb further submits that no written statement/objection was filed by the Opposite party Nos. 14(b) to 14(h) in the case. However, the trial Court by his order dated 30-6-1986 wrongly and

illegally observed that the O.P. Nos. 14(b) to 14(h) filed written objection. This is the Prime contention of Mr. S. Deb that the appeal is not abated and that the appellate Court has the power under Order XLI, Rule 4, C.P.C. to proceed with appeal and to reverse or vary the decree in favour of the appellants. He further submits that the said deceased respondent Nos. 2 and 4 as well as the pro forma

respondent No. 11 had failed to appear and contest the suit at the hearing and had failed to file a written statement in the case. Therefore, according to Mr. Deb learned counsel for the appellants, the appellate Court may exempt the appellants from the necessity of substituting the legal representatives of any such respondent who have failed to file a written statement or have failed to appear and contest the suit at the hearing as per provisions of law contemplated under Order XXII, Rule 4(4) of C.P.C.

9. Mr. S. Deb, learned senior counsel for the appellants went on to refer the provisions of law contemplated under Section 73 of the, Indian Trusts Act 1882 relating to the appointment of new trustees on the death of other trustees etc. For proper appreciation in the matter the provision of Section 73 is hereby quoted below:

'Section 73. Appointment of new trustees on death, etc. -- Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from India, or leaves India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction unfit or personally incapable to act in the trust, or accepts an inconsistent trust a new trustee may be appointed in his place by -

- (a) the person nominated for that purpose by the instrument of trust (if any), or
- (b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or
legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustee, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee

is to be the sole trustee.

The provisions of this section relative to trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.'

10. To answer the contention of Sri Deb, Mr. A. M. Lodh, learned senior counsel for the respondent submits that as per provision of Section 1 of the Indian Trusts Act nothing herein contained affects the charitable endowments and nothing in the Second Chapter of this Act applies to trusts created before the said day; (1st day of March, 1882).

11. Be that as it may, assuming that the discretion under Order XXII, Rule 4(4), C.P.C. can be exercised even after abatement of the suit or appeal as already taken place, the proper stage for application under sub-rule (4) of Rule 4 of Order XXII, C.P.C. is when the averment becomes known to the appellants. It is established principle of law that exemption under this rule cannot be granted when the plaintiff or the appellant knew the death of the defendants or respondents long ago and he had also failed to file an application for substitution in the matter after a lapse of many years. The same thing happened in the present case inasmuch as the appellants came to know the existence of the death of the respondents Nos. 2 and 4 at the latest by 23rd July, 1990 on which the report of the Process Surver has been sub-

mitted in this Court with regard to the information about the death of the respondents Nos. 2 and 4. It is a fact that the appellants did not make any attempt for causing for substitution of the legal representatives of the deceased-respondents. Over and above this facts, the appellant No. 1 did not make any attempt for causing substitution of the legal representatives of the appellant No. 2 as well as the pro forma respondent. No. 11 till today by filing application for

substitution of their legal representatives on record.

12. It is settled law of the land that if one of the appellants dying pending appeal, his legal representatives if not brought on record and if the decree being joint one, whole appeal abates. In this connection a reference may be made in a case between Ram Sarup v. Munshi reported in AIR 1963 SC 553 wherein the Apex Court held that where as the decree was a joint one and a part of the decree had become final, by reason of abatement, the entire appeal must be held to be abated.

13. In a case between Ramagya Prasad. Gupta v. Murli Prasad respondents reported in AIR 1972 SC 1181, their lordships of the Apex Court by majority made the relevant observation and the same is quoted below:

'It is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be provided with and is liable to be dismissed. But that is so not because of the procedural defect but because it is part of the substantive law. No exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the Courts have applied _one or the other of three tests. The Courts WILL not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent, and therefore it would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased-respondent; (b) when the appellant could not have brought the

action for the necessary relief against those respondents alone who are still before the Court, and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed. These three tests are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal.'

14. In the instant case all the three ingredients enunciated above by the Apex Court have been fulfilled not to speak about a single ingredient may be (a) or (b) or

(c).

15. Last but not the least, it is pertinent to point out that the appellant No. 1 did not make any attempt even for causing or bringing the legal representatives of the deceased-appellant No. 2 and the pro forma respondent No. 11 who are said to be the trustees of the said Will but not to speak of the substitution of the legal representatives of the respondents Nos. 2 and 4 who died long long back despite the knowledge of the appellants in the present case.

16. In my considered view, the whole appeal (the present appeal) abates.

17. Moreover, I am of the view that the trial Court under the circumstances was justified in holding that the petitioners have failed to, prove the execution of the said last Will of Satyendra Kumar Dutta Choudhury.

18. For the reasons stated above, this appeal is abated. The appeal therefore, fails and is dismissed.

19. No costs.

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