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Court : Patna

Decided On : May-03-2011

Judge : Mungeshwar Sahoo, J.

Acts : Indian Succession Act - Section 263; Code of Civil Procedure (CPC) (C.P.C) - Section 99, Order 6, Rule 14

Appeal No. : FIRST APPEAL No.219 OF 2003. Case No. 37 of 1984/ 3 of 2002.

Appellant : Basundhara Devi @ Basundhare

Respondent : Hare Ram Tiwari. and ors

Judgement :

1.against the judgment and order dated 27.6.2003 passed by Sri A.P. Srivastava, Presiding Officer, Fast Track Court, Siwan in Misc. Case No. 37 of 1984/ 3 of 2002 dismissing the case filed by the appellant under Section 263 of the Indian Succession Act.

2. The original petitioner Sughara Devi along with the appellant Basundhara Devi filed the aforesaid Misc. Case No. 37 of 1984 for revocation of the probate granted on 17.7.1984 in Probate Case No. 11 of 1977 in favour of the opposite parties-respondents. During the pendency of the said misc. case Sughara Devi died. Basundhara Devi, the appellant is the daughter of Sughara Devi through Ramagya Tiwari. The application under Section 263 of the Indian Succession Act was filed alleging that Ramhit Tiwari had two sons namely, Rajendra Tiwari and Dalthaman

Tiwari. Dalthaman Tiwari had two sons namely, Ramagya Tiwari and Jhoolan Tiwari. Ramagya Tiwari predeceased his father leaving behind two widows namely, Dularo Devi and Sughara Devi and a daughter through Sughara Devi namely, Basundhara Devi who is the appellant. Jhoolan Tiwari had three sons who are the respondent namely (1) Hare Ram Tiwari, (2) Bali Ram Tiwari and (3) Birendra Tiwari. The appellant was married with Bikrama Tiwari. Dalthaman Tiwari died in the year 1969, therefore, the daughter and the widow i.e. appellant and her mother have got direct title and interest in the property of Dalthaman tiwari but the respondents filed Probate Case No. 11 of 1977 for grant of probate of the will said to have been executed by Dalthaman Tiwari in favour of the opposite party-respondent on 17.3.1969 without citing the name of the appellant and her mother in the said probate case. Since the appellant had direct interest in the property, they were entitled for the citation and, therefore, the grant of probate is liable to be revoked or annulled.

3. It appears that the records of the Probate Case No. 11 of 1977 as well as the record of Misc. Case No. 37 of 1984 were burnt and, therefore, the records were reconstructed with the consent of the parties. The parties filed the typed copy/certified copy/photocopy of the applications, orders and depositions and other relevant documents.

4. From perusal of the objections filed by the opposite parties- respondents it appears that the main defence of the respondents is that the application for revocation was not signed by the petitioners and also it was not verified according to Order 6 Rule 14 C.P.C. and, therefore, the petition is not maintainable. The properties were self acquired property of Dalthaman Tiwari and he excluded the petitioners from inheritance by executing the registered will, therefore, the petitioners are neither necessary nor proper party in the probate proceeding. The petitioners are not liable to get the probate order revoked. The applicant and Bikrama Tiwari had full knowledge about the filing of the probate case. The notice of Jhoolan Tiwari and Aklu tiwari was served by the peon in presence of the applicant and Bikrama Tiwari. This objection is available in the lower court record at page 77. This objection is signed by the three respondents namely Hare Ram Tiwari, Bali Ram Tiwari and Birendra Tiwari.

5. On the basis of the pleadings of the parties, the learned court below framed the following four issues : "(i) Is the application for the revocation maintainable (ii) Is the petition presented in proper form (iii) Has the petitioner made out a good case for revocation of the probate already granted in favour of the O.Ps (iv) Should the probate granted in favour of the O.Ps be revoked ?"

6. After trial the learned court below at paragraph 28 of the judgment held that the petitioner had full knowledge of the filing of the probate case at relevant time in view of the evidence of the second wife of Ramagya Tiwari. At paragraph 29 the learned court below held that the petitioner has not been able to prove that she had come to learn the fact of grant of probate through her husband in the manner alleged, particularly when she had not examined any clerk through whom she had taken work and the petition for revocation is not presented in proper form and the same is not verified by the competent person as required by law. Accordingly, the learned court below held that it is not a fit case in which the prayer of the petitioner for the revocation of the probate should be allowed and dismissed the application.

7. The learned senior counsel Mr. Shashi Shekhar Dwivedi appearing on behalf of the appellant raised only questions of law assailing the impugned judgment and submitted that the appellant is admitted to be daughter of Ramagya Tiwari. Admittedly, neither the present appellant nor her mother Sughara Devi were made party in the probate case and, therefore, in view of Section 263 illustration II of the Indian Succession Act order granting probate was liable to be revoked. The learned counsel further submitted that so far finding of the court below that the application was not in proper form or that it was not signed or verified by the competent person is concerned subsequently, an application was filed by the appellant seeking permission to sign the revocation application and moreover it relates to only procedural law and, therefore, does not affect the merit of the case. On that ground the learned court below would not have/should not have rejected the claim of the petitioner.

8. On the other hand, the learned counsel Mr. Chandrakant appearing on behalf of the respondents submitted that originally only one respondent was made party in the revocation application. Therefore, the probate granted in favour of three

respondents cannot be revoked. The other two brothers of Baliram were necessary party. The learned counsel further submitted that Bikrama Tiwari had only signed the revocation application who was not a competent person. The revocation application was not verified according to Order 6 Rule 14 and, therefore, the revocation application was not properly presented by the petitioner and, therefore, there was no legal and valid application for revocation in the eye of law. Accordingly, the learned court below has rightly rejected the same finding that there was no verification.

9. The learned counsel further submitted that the other widow of Ramagya Tiwari has been examined on behalf of the respondents in this case who gave evidence to the effect that the appellant and Bikrama had got knowledge about the probate proceeding in Probate Case No. 11 of 1977 but they did not object. The petitioner falsely alleged that subsequently, she learnt about the proceeding through her husband only with a view to revoke the order of granting probate. The learned counsel further submitted that originally the application was not signed but subsequently the application filed by the appellant seeking permission to sign the revocation application was rejected. Only one brother Hare Ram Tiwari was made party subsequently it appears that the forgery was committed and the names of other brothers have also been mentioned. Considering all these aspects of the matter the learned court below has rightly rejected the revocation application.

10. In view of the above contentions of the parties the point arises for consideration in this appeal is, as to whether the application under Section 263 of 1984 filed by the appellant for revocation of the order granting probate in Probate Case No. 11 of 1977 was maintainable and the order granting probate was liable to be revoked and whether the impugned judgment and order is sustainable in the eye of law ?.

11. Admittedly in this case from perusal of the record itself it is clear that fire was caught and substantial part of the record has been burnt. The parties have filed the typed copy of revocation application and also the objection petition. It is also admitted fact that the original revocation application was not signed by the appellant rather it was signed by her husband stating that he is Karinda of the

petitioner. It further appears that subsequently an application was filed by the appellant seeking permission to sign the revocation application. Moreover, the revocation application has been signed by the Advocate of the appellant.

12. In AIR 1928 Patna 51 W. Johnston and others v. Rameshwar Singh Bahadur it has been held that "signing of a plaint is merely a matter of procedure and any defect therein is remediable at any stage of litigation even in the appellate Court, the reason being that the omission to sign or verify a plaint is not such a defect as can affect the merits of the case and can be remedied under Section 99 C.P.C."

13. In AIR 1925 Lahore 144 (1) Ali Ahmad v. Abdul Ghani and others it has been held that it is quite clear that the plaint was signed by a third person on instruction from the real or ostensible plaintiff it cannot be held that the plaint was not signed by a duly authorized person though his authority may have been objectionable.

14. In AIR 2000 Madras 266 Mangayarkarasi v. Suseela and others it has been held that the opposite party cannot question the authority of counsel in signing the memo on behalf of his client and cannot insist that party also should sign it. At paragraph 10 it has been held that Advocate is considered to be the agent of the parties and his acts and statement made within the limits of authority given to him are the acts and statement of party who has engaged him. In the present case at our hand admittedly, the husband of the appellant had signed the misc. application on the ground that he is the karinda i.e. the authorize person. It is admitted that advocates of the appellant had also signed the misc. application.

15. In view of the settled principles of law, the misc. application signed by Karinda, the authorized person of the applicant and also by the Advocate should not have been rejected on the ground that the application was not signed by a competent person. It is only a matter of procedure and it does not affect the merit of the case. It can be remedied at any stage. In the present case at our hand, it appears that subsequently an application was also filed by the applicant seeking permission to sign the revocation. In my opinion, therefore, the finding of the learned court below on these points is not sustainable.

16. The learned counsel for the respondents submitted that the application was not properly verified. So far this objection is concerned also it does not affect the merit of the case and it relates to procedure and the said defect can also be removed at any stage. Moreover, the respondents cannot insist that the pleading must be signed or verified by the parties himself. The agent's signature can be accepted as sufficient signature on behalf of the plaintiff. In the present case, there is no dispute that Karinda of the plaintiff signed and verified the plaint, the objection for statement of paragraphs are based on record or based on his information has not been stated is only a technical objection. It is not sufficient to reject the whole case of the plaintiff. In 1986 PLJR 162 Gulab Chand Sao alias Gulab Chand v. Ram Lal Sao this court has held that verification of pleadings can be made by any person acquainted with the facts of the case. It is not necessary that the parties himself swear the affidavit. In view of the above settled principles of law, I do not find any force in the submission of the learned counsel for the respondents.

17. The learned counsel next submitted that only one brother Hare Ram was made party originally. So far this submission is concerned also I find no force because subsequently, the amendment was prayed for. The application for revocation of the probate is available on record wherefrom it is clear that three brothers in favour of whom the probate has been granted are already on record. From perusal of the objection which is available at page 77 of the lower court record which appears to be burnt it is apparent that the three brothers who are respondents here filed the objections. If they were not party there was no question of filing objection signed by all of them. The learned counsel for the respondents submitted that it was manipulated and forgery has been done subsequently. So far this submission is concerned there is no foundation. From perusal of the impugned judgment and order it is clear that this question was neither raised in the court below nor there is finding to that effect. On the contrary from the revocation application and the objection filed by the three brothers which is at paragraph 77 it is clear that the three of them are party and filed the objection jointly.

18. The learned counsel for the respondent submitted that the applicant had the knowledge about the proceeding of the Probate Case No. 11 of 1979. Admittedly,

neither the appellant nor her mother was cited in the probate application. The statements made by another widow of Ramagya namely Dularo Devi will never be binding on the appellant. Section 263 of the Indian Succession Act reads as follows :

"263. Revocation or annulment for just cause.- The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.- Just cause shall be deemed to exist where-

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations

(i)

(ii) the grant was made without citing parties who ought to have been cited.

19. In view of the said provisions the application for probate filed by the respondents were defective in substances and was made suppressing from the Court the fact that the appellant and her mother were the persons who would have inherited the property of Ramagya Tiwari along with Dularo Devi if there was no will. Illustration II clearly speaks that if grant was made without citing the parties

who ought to have been cited is sufficient to revoke the probate case as for non-citation just cause shall be deemed to extent for revocation. As stated above here the daughter admittedly was not cited.

20. The division bench of this Court in the case of Most. Shivpati Kunwar v. Ramakant Dixit AIR (32) 1947 Patna 434 held that any interest however slight and even the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper. Hence a daughter of the testator who was the person entitled to succeed under Hindu Law on the death of the testator is entitled to citation and she is a person who ought to have been cited as contemplated by illustration II of Section 263 of the Indian Succession Act. Here if there was no will the appellant being the daughter would have inherited the property of testator to the extent of her share. In such circumstances she ought to have been cited but neither she was cited nor notices were sent to her. The general citation is not sufficient in case of the person who ought to have been cited.

21. The learned counsel for the respondents submitted that Jhoolan Tiwari was cited in this case. Admittedly, Jhoolan Tiwari is the father of the respondent. It appears that Jhoolan Tiwari was cited only because he is the father of the respondents but they intentionally did not cite the names of the appellant or her mother who were expected to contest the probate case. The intention is writ large.

22. It appears that the learned court below has not considered the above settled principles of law. In my opinion, the learned court below has wrongly held that the appellant had the knowledge of probate proceeding on the basis of evidence of Dularo Devi particularly, when the appellant was not cited. In my opinion, the appellant was entitled for citation and notice over and above general citation. The learned court below has also wrongly rejected the application holding that it was not in the proper form and not verified by the competent person. In my opinion, this is nothing but a technical approach and relates to procedure only, which does not affect the merit of the case, therefore, the findings of the learned court below on these points are hereby set aside. I find that the appellant has been able to prove that she is a person interested in the property of her father testator and she ought to have been cited in the probate case and she was entitled to be cited and

noticed. Accordingly, the probate application filed by the opposite party respondents was defective in substance and in view of the illustration II of Section 263 of Indian Succession Act itself is just cause for revocation of the probate granted by the court below in Probate Case No. 11 of 1977.

23. In view of my above discussion, I find that the impugned judgment and order is not sustainable in the eye of law.

24. In the result, this first appeal is allowed. The impugned judgment and order is set aside and the revocation application being Misc. Case No. 37 of 1984 is allowed and the order granting probate in favour of respondents by the court below in Probate Case No. 11 of 1977 is set aside and the probate is hereby revoked. The learned court below shall proceed according to law. No orders as to costs.

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