

Asha Devi Vs. Deeplal Rai and Others

Asha Devi Vs. Deeplal Rai and Others

SooperKanoon Citation : sooperkanoon.com/952582

Court : Patna

Decided On : Apr-16-2012

Judge : Shailesh Kumar Sinha

Appeal No. : Appeal From Original Order No. 651 of 2010

Appellant : Asha Devi

Respondent : Deeplal Rai and Others

Judgement :

1. This appeal is directed against the order dated 25th of May, 2010 passed by the Additional District Judge, F.T.C. III, Sitamarhi, in Probate Case No.06 of 2006/01 of 2008, whereby the application of the applicant (appellant herein) filed under section 276 of the Indian Succession Act, 1925 (hereinafter referred to as “the Act”) seeking grant of probate of the Will dated 4th of May, 2001 stands rejected.

2. The case of the plaintiff-appellant, in short, is that one Ram Dayal Rai, resident of Village-Parwaha, P.S.- Parihar, District Sitamarhi died issueless leaving behind his widow Deorati Devi, who inherited entire movable and immovable property of Late Ram Dayal Rai and she came in possession of the property as an absolute owner. The further case is that the applicant and her husband Rajgir Rai, who happens to be the cousin of Late Ram Dayal Rai, used to look after them as also their property. Since Ram Dayal Rai died issueless and on account of being pleased with the service rendered by the applicant and her husband, the widow of

Late Ram Dayal Rai, namely, Deorati Devi executed the aforesaid Will in favour of the applicant Asha Devi, wife of Rajgir Rai, with respect to the property measuring about 4 Acres 59 Decimals of land as detailed in Schedule-A to the application for probate. Deorati Devi died on 23rd of December, 2005. The applicant sought grant of probate of the aforesaid Will by filing an application under section 276 of the Act.

3. The opposite parties (respondents herein) filed caveat as also objection opposing the grant of probate of the Will on the ground that the Will in question is forged and fabricated. The applicant and her husband never rendered any services to Late Ram Dayal Rai and his widow nor managed their affairs and as such, they had no love and affection towards them, as claimed. The opposite parties further denied the claim that the applicant and her husband performed the last rites of the testator or her husband nor the applicant was ever living with them. The further case of the opposite parties is that neither Deorati Devi directed the scribe to scribe the deed of Will nor she put her signature on the Will nor she directed any of the attesting witnesses to attest the Will. Further case is that the applicant neither came in possession nor she made any expenditure towards the performance of the last rites of the testator Deorati Devi after her death on 23rd of December, 2005. The opposite parties after the death of Deorati Devi came in possession as being the legal heirs. Title Suit No.107 of 2006 was filed by the husband of the applicant Rajgir Rai with respect to certain properties. In a nutshell, the case of the opposite parties was that the Will is not a valid and genuine being a forged document.

4. Mr. Yogendra Mishra, learned counsel appearing on behalf of the appellant submits that the court below while considering the application for grant of probate was not consistent with the law. It is submitted that in consideration for grant of probate of a Will, the paramount consideration is of the genuineness of the Will. In such proceedings, the question of the vested title or entitlement to the title is not a matter to be considered. From the order under appeal it appears that the learned court below made all its endeavours to find out the valid justification for grant of the probate of the Will in favour of the applicant and her relationship with the testator vis--vis the relationship of the opposite parties with the testator. The

applicant is the wife of the cousin of the husband of the testator whereas the opposite party is the son of the sister of Ram Dayal Rai. It is contended that Deorati Devi was the absolute owner of the property left by Ram Dayal Rai absolutely free to deal with the said property either by sale, gift, Will or in any other manner. Therefore, Deorati Devi was free to execute the Will to any one to whom she wishes and the normal rule of succession, if any, does not come in the way. In support of the probate of the Will, the applicant examined the scribe of the Will, namely Ram Chalitra Rai (A.W.2) as also the attesting witnesses, namely, Jageshwar Mahto (A.W.1) and Dinesh Mishra (A.W.4) and other witnesses, namely, Upendra Rai (A.W.3), Feku Mahto (A.W.5), Ram Swaroop Rai (A.W.6) and Laxmi Yadav (A.W.7). These witnesses have supported the case of the applicant on the point of the execution of the Will in her favour. The applicant herself examined as A.W.8 and supported the averments made in her application. It is submitted that scribe Ram Chalitra Rai stated in his deposition that the Will in question was scribed on the instruction of the testator Deorati Devi to scribe the Will and the Will was read over and explained to her, who after understanding the Will put her left thumb impression on the Will in presence of Dinesh Mishra (A.W.4) and A.W.1 Jageshwar Mahto. A.W.4 Dinesh Mishra identified the L.T.I. of Deorati Devi and made endorsement to the effect that the Will in question was executed by Deorati Devi and he put his signature on the Will on the instructions of the testator. Similarly, A.W.1 Jageshwar Mahto also stated that Deorati Devi put her L.T.I. on the Will in question after the same was being read over and explained to her by scribe Ram Chalitra Rai. The testator put her L.T.I. on the said Will after understanding the contents of the Will and on the instruction of the testator, A.W.1 Jageshwar Mahto also put his signature as attesting witness. In a nutshell, it is submitted that the execution of the Will was duly proved as would be appearing from the evidence of scribe A.W.2 as also of the attesting witnesses A.W.1 and 4 as also of A.W.3, who recognized the testator. Other witnesses A.Ws.5, 6 and 7 have given the evidence to the effect that the testator had told them about the execution of the Will in favour of the applicant. Learned counsel submits that an area of 10 decimals of land with respect to Revisional Survey Plot No.235, as mentioned in the Will, was already sold by the husband of the testator as per the sale deed dated 12.10.1998, vide Ext.A. As such, the probate of the Will could

have been granted with respect to the rest of the area. In support of such submission, learned counsel referred to a decision in the case of Sarat Kumari Bibi v. Rai Sakhi Chand, reported in A.I.R. 1929 Privy Council 45, wherein it was held that part of the probate of a Will can be granted. Learned counsel submits that although registration of a Will is not mandatory as discussed by the court below, but non-registration of the Will in question was taken as a circumstance creating a doubt with respect to the genuineness of the Will has no support of law. The court below also given undue importance to a minor correction in one of the plots mentioned in the Will having no bearing on the issue, even though it was held such correction a circumstance to indicate that the Will is not genuine. In other words, it is submitted that the rejection of the application for grant of probate of the Will was not correct in law for the reasons as discussed by the court below in the order under appeal.

5. On the other hand, learned counsel for the respondents submits that the execution of a Will consisting of Revisional Survey Plot No.235, measuring an area of 10 decimals of land, which was already sold by the husband of the testator, non-registration of the Will even though the testator remained alive for a period of about four years after the execution of the Will, absence of any explanation for such non-registration, signature of the testator did not indicate that the L.T.I. of Deorati Devi on the document was put for the purpose of the Will, attesting witnesses also did not sign the Will as required under the law, no specific date was given as to when the testator told A.Ws.5, 6 and 7 that she had executed the Will in favour of the applicant, the claim of the applicant that she along with her husband used to look after the testator and her husband Ram Dayal Rai, were not proved or established by the applicant. It is submitted that Dhansariya Devi (D.W.7) has stated that the last rites of the testator Deorati Devi was performed by her son. It is contended that the above facts suggest that the Will was not a genuine; more so the Will contains one overlapping plot, interpolation in one of the plots, execution of the Will by Deorati Devi was not as per law and as such, it was for the applicant to establish the genuineness of the Will beyond reasonable doubt when the Will was not registered even though had sufficient time for such registration. It is contended on behalf of the respondents that the opposite party witnesses have denied that Asha Devi and her husband used to look after the

testator. There is further discrepancy in the evidence of A.W.8 Asha Devi with respect to performance of Sharadh of the husband of the testator. Learned counsel submits that even though the opposite party witnesses, except D.W.7 Dhansariya Devi, were the purchasers of the land during the pendency of the probate proceeding, no doubt, their evidence that the applicant and her husband were not looking after the testator or her husband cannot be overlooked. Title suit No.107 of 2006 filed by the husband of the applicant with respect to survey land, although not covered under the Will, was dismissed. Learned counsel further submits that the decree dismissing the suit was set aside on an appeal and a second appeal is pending. Learned counsel for the respondents, in other words, supports the order under appeal and submits that the court below having taken various circumstances to hold that the Will in question was doubtful and not a genuine and accordingly, refused to grant probate of the Will.

6. Upon considering the rival submissions of the parties, it would appear that on the question of genuineness of the Will, the appellant submits on the basis of the evidence on record that on the direction of the testator, the Will in question was scribed, who after understanding the pros and cons of the Will put her L.T.I. on the Will with intention to put her signature for the purpose of the Will, which was duly attested by the attesting witnesses as also other witnesses, who deposed before the court that the testator had told them about the execution of the Will. The Will was duly executed and proved as the evidence was of the plaintiff witnesses whereas submission of the respondents is that the very existence of the Will is doubtful as the execution of the Will by the testator was not as per the law nor the attesting witnesses have put their signatures on the Will as required under the law. On perusal of the Will in question, vide Ext.1, it would appear that the testator had put her L.T.I. on the margin of the Will. Endorsement of the L.T.I. was made by Dinesh Mishra (A.W.4), who supported the execution of the Will with respect to the property under the Will. Attesting witnesses no. 1 Jageshwar Mahto also put his signature. Scribe A.W.2 Ram Chalitra Rai also put his signature. Now the evidence of the scribe and the attesting witnesses read with their signatures on the Will in the absence of any counter evidence on the record, there could be no valid justification for disbelieving the plaintiff evidence. The claims and the counter claims are with respect to the title or entitlement over the property in question. The

question does not fall for consideration in the probate proceeding, as such the normal rule of succession cannot come in the way in execution of the Will by the testator under the Act. As regards the overlapping of the land vide Survey Plot No.235 measuring 10 decimals of land, which was already sold by the husband of the testator as mentioned in the Will, in absence of any evidence on the record to suggest that the said property was included with any ill intention can be segregated and the probate of the Will may be allowed with respect to the rest of the property as contended by the learned counsel for the appellant.

Similarly, some cuttings in one of the numbers of the plot cannot be termed as an interpolation in absence of any evidence or any undue advantage in favour of the applicant. Therefore, upon considering the submissions and on perusal of the evidence on record, in my opinion, the rejection of the application for grant of probate of the Will by the court below is not justified in law. The applicant was entitled for the grant of probate of the Will in question except with respect to Revisional Survey Plot No.235 measuring 10 decimals of land as mentioned in the Will.

7. For the reasons and discussions as made above, the order under the appeal is set aside and the probate of the Will dated 4.5.2001 (Ext.1) be granted with respect to all the lands except Revisional Survey Plot No.235, as mentioned above.

8. In the result, the appeal is allowed to the extent indicated above. However, in the facts and circumstances of the case, there shall be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com