

HIGH COURT OF ORISSA: CUTTACK

FAO. NOS. 109 OF 2007 & 30 OF 2008

From the common judgment dated 19.9.1995 passed by Shri M.M. Mohanty, Civil Judge (Senior Division), Ist Court, Cuttack in O.S. No. 9 of 2003 (Probate Misc. Case No. 19 of 1996) and O.S. No. 10 of 2003 (Probate Misc. Case No. 1 of 1997).

In FAO No. 109 of 2007
and FAO No. 30 of 2008

Bidulata Mohanty Appellant

-Versus-

Sangram Kesari Nayak Respondent

For Appellant : M/s. P.K. Nayak-I,
P.K. Mohanty & M. Das

For Respondent : M/s. A. P. Bose, R. K. Nayak
& F.R. Mohapatra

M/s. S.K. Mandal & M. Mohapatra
(For Intervenor)

Date of Judgment: 31.01.2014

P R E S E N T:

THE HONOURABLE SHRI JUSTICE M.M.DAS

M.M. Das, J. Both the appeals have been filed by the appellant against the common judgment and order dated 19.2.2005 passed in Original Suit No. 9 of 2003 (Probate Misc. Case No. 19 of 1996) and Original Suit No. 10 of 2003 (Probate Misc. Case No. 1 of 1997) by the learned Civil Judge (Senior Division), First Court, Cuttack.

2. O.S. No. 9 of 2003 was filed by the present respondent under Sections 276 and 278 of the Indian Succession Act for grant of

probate of the Will dated 6.11.1995 and O.S. No. 10 of 2003 was filed by the present appellant for grant of probate of the Will dated 26.1.1995. Both the Wills were executed by the testatrix, namely, Major Miss. Sybil Holmes, daughter of late Alfred Joseph Holmes. The appellant was the defendant in O.S. No. 9 of 2003, where the respondent was the plaintiff and it was vice-versa in O.S. No. 10 of 2003.

3. It appears from the facts of the case that under Ext. 1, the Will allegedly executed in favour of the respondent by the testatrix on 6.11.1995 has been drafted in English. The entire movable and immovable properties of the testatrix have been bequeathed to the propounder (respondent) to be utilized for the purpose of running an orphanage for the orphans and destitute children. The properties so bequeathed is placed under three schedules i.e. A, B and C. In Schedule-A, the furniture, fixtures, utensils, sewing machines and telephone etc. are bequeathed. In Schedule-B, the bank accounts of different banks and in Schedule-C, the immovable properties consisting of one pucca building with vacant land of Ac. 0.76 decimals and an English Medium School at Kesharpur in the name and style of "Major Holmes School" started in the year, 1974 are bequeathed to the beneficiary. Therefore, Ext. 1 contains a complete list of the total moveable and immovable left behind by the deceased testatrix. The peculiarity of the bequeath made in Ext. 1 is that the executor has been restrained and directed

not to sell or mortgage the Schedule-C properties in any manner. As such, the intention behind the disposition is that the executor is to act more or less as a manager of the proposed orphanage and not to alienate the same for his personal benefit or gain.

4. Ext. A, the Will allegedly executed on 26.1.1995 in favour of the present appellant is drafted in Oriya. In Ext. A, only a part of immovable property out of the property mentioned under Ext. 1 has been bequeathed in favour of the present appellant. The said Ext. A is silent about the rest part of the building, vacant portion of the land, bank accounts, moveable properties like furniture and fixtures and other articles. There is no mention in Ext. A with regard to management of the institution established by the testatrix i.e. English Medium School named as “Major Holmes School” at Kesharpur, Cuttack.

5. As stated above, the testatrix in both the Wills is the same person, who appears to be a pious Christian lady and was leading a retired life from nursing service in defence. The facts further reveal that she had a deep concern for the orphans and her only desire was to save and take care of the life of such orphans and destitute children, because she herself was an orphan and prior to death, she served the orphans for many years. These facts can be considered to be admitted by both the parties from the materials on record.

6. With regard to the past career of the testatrix, it appears that her mother tongue was English. She was studying outside the country and was a foreigner. She was making all correspondences in English and was not able to read and write Oriya, but, however, she was able to speak Oriya to some extent.

7. Upon the pleadings being completed and the documents produced by the parties being marked as Exts. as well as the oral evidence being recorded, the trial court framed the issues to be answered which are follows:

- (i) Whether the testatrix had a disposing mind, if 'yes', in what manner?
- (ii) Whether the two 'Wills' have been properly executed and attested?
- (iii) Whether there is suspicious and vicious circumstances existing in any of the Wills?
- (iv) Which of the two Wills is the last Will and is to be probated?

8. Probate of a Will cannot be allowed, if the court comes to the conclusion that such Will is shrouded by suspicious circumstances or the same is created fraudulently. The trial court on Issue Nos. 2 and 3, which are vital issues, after discussing the evidence adduced by the parties, found that there is no dispute with regard to identity of the testatrix in both the Wills and the fact that the properties bequeathed in both the Wills belong to the testatrix.

Further, it is an admitted case that under the Will (Ext. A), a part of the properties as mentioned in the Will (Ext. 1) is covered.

9. Considering the surrounding circumstances and the nature of the evidence adduced, the trial court found that the Will (Ext. A) dated 26.1.1995 allegedly executed in favour of the appellant has not been executed by the testatrix, late Major Miss Sybil Holmes and it is not proved to be the outcome of free Will and volition of the testatrix and it is also not duly proved. On the other hand, the Will dated 6.11.1995 under Ext. 1 executed by the testatrix in favour of the present respondent, who was the plaintiff in O.S. No. 9 of 2003, is duly attested and it is the outcome of free Will and volition of late Major Miss Sybil Holmes. With regard to Issue No. 4, in view of its findings on the above two issues, the trial court recorded that Ext. 1 is the last Will of the testatrix, which is free from all suspicions and the same is genuine being an outcome of the free Will and volition of the testatrix. On Issue No. 1, the trial court found that the respondent, who was the plaintiff in O.S. No. 9 of 2003, is the propounder of Ext. 1 and has got cause of action to file the suit. Lastly, the trial court found that in view of its findings on the foregoing issues, the plaintiff in O.S. No. 9 of 2003 (respondent herein) is entitled to the prayer for grant of probate of the Will dated 6.11.1995 under Ext. 1. Accordingly, the trial court dismissed the suit filed by the appellant i.e. O.S. No. 10 of 2003 on contest and decreed the suit (O.S. No. 9 of 2003) filed by the respondent, on

contest. Consequently the trial court directed grant of letters of administration in favour of the present respondent, who was the plaintiff in O.S. No. 9 of 2003 with a copy of the Will under Ext. 1 in respect of the property as mentioned in the schedule of the said Will. The appellant being aggrieved has preferred both the aforesaid appeals against the common judgment.

10. The above findings, when juxtaposed with the evidence on record, it would be found that D.W. 1 examined on behalf of the appellant made the statement that Major Miss Sybil Holmes was very much concerned about the orphans and destitute children. She was paying the money and Sangram Sir (P.W. 1) was looking after the management and the testatrix was thinking to dispose of her property in favour of orphans and Sangram Sir was assisting the testatrix in this regard.

11. D.W. 4 in his cross-examination has stated that it is clear that testatrix had the intention to dispose of all her movable and immovable properties in favour of orphanage only and not for any other purpose. D.W. 1 in his cross-examination has stated that each year the respondent was hosting the National Flag where the orphans used to come. He further stated that Sybil was suffering from paralysis. Sangram Sir was bringing medicine for her and bringing vegetables etc. We were taking salaries from Sangram Babu. She was paying the money and Sangram Sir was looking after the management. Sangram Sir was assisting the testatrix in this regard.

12. The appellant in her deposition has stated that her qualification is matric fail. She was reading in Ravenshaw Girls' High School. She had taken training for dresser in Cuttack City Hospital but has not filed the training certificate. She was not reading in Nursing School or College. She is not a trained nurse. However, in the Will under Ext. A, though the appellant who was the allegedly propounder/legatee was described as a professional and trained nurse in her plaint but during her examination as witness, she deposed to be a 'Dresser' by profession and not to be a nurse. She has further stated in her cross-examination that she joined with the testatrix in the year, 1985 and was attending the testatrix to look after her ailing health as paid employee at Rs. 400/- per month as salary.

13. The respondent produced Ext. 2 dated 19.7.1985, which is also a registered Will in favour of the respondent and two others, and was cancelled by the testatrix by executing a fresh Will (Ext. 1). Exts. 3 to 20 are documents, which indicate about the past service and position of the testatrix and also proves that after her death, an orphanage with the name and style of "Sybel Memorial Children's Home" is running over the bequeathed property being managed by the present respondent. The appellant only filed one document i.e. the alleged Will under Ext. A.

14. D.W. 4 Bina Behera, in her evidence during cross-examination has stated that Ext. 2 is a registered document and has

remained unchallenged. In para-3 and 4 of Ext. 2, the intention of the testatrix is disclosed. The testatrix has stated that all her properties shall belong to orphans and destitute children's Home, which she wished, should be started after her in the name and style of 'Sybil Memorial Children's Home'. To build such an institution was her long cherished hope as she has given her life and blood for orphans and also she was deeply concerned about the future of such orphans of this vast country. It was her desire that this children's home should live and grow and take care of the orphans.

15. Ext. 1 is in conformity to Ext. 2 which discloses her intention. It is stated in Ext. 1 that all her properties mentioned in Schedule-A, B & C of the Will, Sri Sangram Keshari Nayak is to start one orphanage for the orphans and destitute children in the name and style of 'Sybil Memorial Children's Home' in the house of the testatrix more fully described in Schedule-C which is her life's desire and she has given her life and blood to the orphans and she is deeply concerned about their future. She has further stated that all her properties will go to Sri Sangram Keshari Nayak who will run 'Sybil Memorial Children's Home' and this will be managed by her executor Sri Sangram Keshari Nayak to the best of his ability.

To avoid mis-utilization of her property in other manner, she has given a protective warning that her executor (Sangram Keshari Nayak) shall not sale or mortgage the property in any other manner.

16. From a bare reading of the contents of Exts. 1 and 2 and disposition of D.W. 4, it is clear that the testatrix had a mind to dispose of all her properties for the purpose of running an orphanage under the management of Sri Sangram Keshari Nayak for the orphans and destitute children of the country and not for any other purpose. To bequeath her property for personal use and benefit and gain was contrary to her last wish and desire.

17. **Due Execution and attestation of the Will.**

To prove due execution and attestation of a 'Will', the relevant provision is laid down under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

Section 68 of the Evidence Act provides that a 'Will' compulsorily is to be attested. Section 63 of the Indian Succession Act further provides that the 'Will' is compulsorily to be attested by at least two or more witnesses. These provisions/requirements must be satisfactorily proved by the party who claims probate. For execution and attestation, the propounder of the 'will' has to prove that there are two witnesses who saw the testatrix sign in the Will and the attesting witnesses have signed the 'Will' in presence of the testatrix.

When we examine Ext. 1 in the aforesaid pari materia, it is seen that the testatrix as well as the two attesting witnesses have signed in presence of each other. In page-4 of Ext. 1, the executant/testatrix has certified that she has executed her last 'Will' and testament in presence of attestors Rashmi Ranjan Sahu and

Sridhar Das, who have seen her executing the 'Will' and have signed in her presence. The two attesters have also certified that they have witnessed the execution of the Will by Miss. Sybil Holmes and signed in her presence.

18. This aspect has also been clearly proved from the depositions of P.Ws.1 and 3 being stated in their cross-examination in the following manner:

P.W. 2 has stated that at the time of execution of Ext.1, P.W. 1, Sridhar Das, Bina Behera, Advocate A.K. Rao and Typist R.K. Barik were there. The testatrix signed the Will first and then P.W. 2 Sridhar Das and Bina Behera signed thereon. The testatrix signed first and then the attesting witnesses signed.

From the affidavit and the aforesaid evidence of P.Ws. 2 and 3, it can safely be concluded that Ext. 1 has been duly executed, attested and fulfilled all the conditions required by law. On the other hand, Ext. A does not disclose the names of the attesting witnesses from out of all those witnesses who signed it.

Daitari Mohapatra, who has been examined as D.W. 2, claims to be the only attesting witness in Ext. A. His evidence is full of doubtful circumstances. He is an interested witness since he was the home tutor of the son of Bidulata Mohanty. He has not stated nor it is known as to who is the other attesting witness in Ext. A. None of the other witnesses of Ext. A has come forward to depose that he is the second attesting witness. In absence of another

attesting witness neither known nor examined, the requirement of Section 63 of the Indian Succession Act is not complied. The Will attested by only one attesting witness is invalid and inoperative in the eye of law. Probate cannot be granted in such a case and prayer is bound to fail. So, it can safely be concluded that Ext. A has not been duly executed, attested or proved. Probate of Ext. A is liable to be refused on this score alone.

19. **Vicious and suspicious circumstances of the Will**

Suspicious circumstances in a Will are the questions of fact and cannot be accurately defined. The court is to scan the documents and come to the conclusion whether the suspicious circumstance is of such nature that it would be sufficient to refuse probate of the Will. Ext. 1 is free from any doubtful circumstance of any manner. The hostile evidence of D.W. 4, Bina Behera, cannot be coloured to be suspicious circumstance. It is not unusual that during evidence, many witnesses turn hostile and depose falsehood in evidence. Bina Behera is no exception to this. The evidence of Bina Behera (D.W.4) goes to show that she is a liar out and out, though she has stated that she is illiterate and do not know reading and writing in her cross-examination, she has stated "I was born in April, 1934. Now I am not able to read Bible since last 17 to 18 years as I am not able to see properly".

From her aforesaid statements, it can safely be inferred that D.W. 4 is a literate lady who is able to read Bible 17 to 18 years

back, admitted that her signature which she was unable to see and tell her date of birth according to English calendar. Her intention of turning hostile and deposing falsehood is clear from her statement, where she admitted that she has not understood the contents of the affidavit and could not say who prepared that and on whose instance or instruction, the affidavit is prepared. She further told that she came to the court as a witness to get a piece of land situated towards the backside of the case land and further deposed that the asbestos room should be given to her. The hostility of such interested witness cannot make the Will inoperative. The court is not powerless in such a case. The court can look to the whole circumstances of the case and come to the conclusion that the formalities/provisions of law have been complied and in such event, the court can allow the probate of Will basing upon the evidence of witnesses and documents.

20. On the other hand, Ext. A is surrounded with suspicious circumstances inherent in it and the propounder has not explained those vicious circumstances to the satisfaction of the court. Some of the suspicious circumstances in Ext. A are as follows:

Language of the Will

When it is the admitted case that the testatrix had no knowledge of Oriya, was reading in foreign country, making correspondence in English and could be able to only speak Oriya to

some extent, her intention to scribe the Will in Oriya by an unqualified Advocate's Clerk of Bidulata Mohanty is a grave suspicious circumstance, not explained by the propounder. It is certified below Ext. A by the scribe that the testatrix herself read Ext. A drafted in Oriya which is impossible and can never be correct.

Absence of a second attesting witness

Section 63 of the Indian Succession Act provides for two attesting witnesses to sign the document and to be examined as witnesses. This requirement of law is not fulfilled. Surprisingly in Ext. A, it is not specifically mentioned nor in evidence adduced, any of the D.Ws. deposed as to who is the second attesting witness of the Will.

Bidulata has examined three witnesses out of which she herself is not a signatory to the Will. D.W. 3 is the scribe who admitted that he is not an attesting witness. In such circumstances, D.W. 2 if accepted as attesting witness, there is absence of a second attesting witness. The prayer to probate Ext. A is bound to fail since the provision of law has not been complied with for absence of a second attesting witness.

Section 281 of the Indian Succession Act has not been complied as the provision prescribes that where the application is for probate, the petition shall be verified by at least one of the witnesses.

D.W. 1 in para-34 in her cross-examination has admitted that her plaint (petition for probate in O.S. No. 10 of 2003)

does not contain the attestation/verification of any witness though they know about the filing of the case. From her statement, it reveals that the witnesses of Ext. A are available and procurable. In absence of compliance of the provisions laid down in Section 281, the application is incomplete and cannot be probated. The propounder has no explanation to such non-compliance.

21. From the above discussion, it is clear that the trial court has rightly appreciated the evidence adduced before it both oral and documentary to come to the conclusion that Ext. 1 is a genuine Will executed in favour of the respondent and the Will under Ext. A is shrouded by suspicion. Hence, the conclusion of the trial court cannot be faulted with in these appeals.

22. In the result, therefore, both the FAOs, accordingly, stand dismissed, but in the circumstances, parties shall bear their own cost.

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M.M. Das, J.

Orissa High Court, Cuttack.
Dated the 31st, January, 2014/bks

