



GAHC010070982022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/75/2022

DR. RAMA MUKHERJEE (BHOWMIK)
W/O- LATE DR. SOUMENDRA MOHAN MUKHERJEE, R/O- MOUZA-
MAHABHAIRAB, HATIPILKHANA, P.O. AND P.S. TEZPUR-784001, DIST.
SONITPUR, ASSAM

VERSUS

MITRA MUKHERJEE @ RATNA MUKHERJEE
D/O- LATE HEMENDRA NARAYAN CHAUDHARY, R/O- MOUZA-
MAHABHAIRAB, HATIPILKHANA, P.O. AND P.S. TEZPUR-784001, DIST.
SONITPUR, ASSAM

Advocate for the Petitioner : Mr. D. Das, Senior Advocate.
Mr. G. Goswami, Advocate

Advocate for the Respondent : Mr. S. K. Singh, Senior Advocate
Mr. B. Pushilal, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 06.06.2022

Date of Judgment : 10.06.2022

JUDGMENT AND ORDER (CAV)

Heard Mr. D. Das, the learned senior counsel assisted by Mr. G. Goswami, the learned counsel for the petitioner and Mr. S. K. Singh, the learned senior counsel

assisted by Mr. B. Pushilal, the learned counsel for the respondent.

2. This application under Article 227 of the Constitution of India challenged the order dated 17.03.2022 passed by the Court of the District Judge, Sonitpur, Tezpur in T.S.(P) No. 43/2010 whereby the petition being petition No. 484/2021 dated 01.03.2021 filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short, CPC) for amendment of the written statement was rejected imposing cost upon the petitioner.

3. The brief facts of the instant case are that the respondent herein had filed an application before the District Judge, Sonitpur, Tezpur under Section 276 of the Indian Succession Act, 1925 seeking probate of the WILL of late Dr. Soumendra Mohan Mukherjee dated 18.11.2006. The said application was registered and numbered as Misc. (P) Case No.36/2010. In the said application, the petitioner herein was impleaded as the sole respondent. The petitioner herein challenged the said WILL for which the Misc.(P) Case No. 36/2010 was converted into Probate Title Suit and renumbered as T.S.(P) No. 43/2010. In the said suit proceeding, vide an order dated 21.02.2014, the same was fixed for *ex-parte* hearing and 27.04.2014 was the date fixed for *ex-parte* evidence. On 27.04.2014, the respondent herein submitted the *ex-parte* evidence-in-chief of three witnesses. The petitioner on 16.05.2014 filed a petition for allowing her to file her written statement as no written statement was filed earlier which the Court of the District Judge, Sonitpur, Tezpur rejected and held that the objection filed earlier would be considered as the written statement. The said order was put to challenge before this Court in a writ proceeding which was registered and numbered as WP(C) No.3908/2014 and this Court vide an order dated 13.08.2014, though not inclined to exercise jurisdiction under Article 226 of the Constitution of India, but taking into account that the petitioner herein had undertaken to file the written statement on 26.08.2014, in addition to the earlier written statement, allowed the petitioner to file her additional written statement by 26.08.2014.

4. While the said proceedings were pending, the petitioner herein filed a writ petition

before this Court challenging the right of the respondent herein to receive family pension. The said writ petition was registered and numbered as WP(C) No. 1328/2016 and the said writ petition was disposed of vide order dated 26.09.2018 whereby this Court held that the marriage between the petitioner and late Dr. Soumendra Mohan Mukherjee was never dissolved by a decree of divorce and it being an admitted position of fact that the marriage of the respondent herein with late Dr. Soumendra Mohan Mukherjee took place during the currency of his marriage with the petitioner herein, this Court observed that the respondent herein cannot claim family pension as the legally married wife of late Dr. Soumendra Mohan Mukherjee. It was further held that the family pension by no stretch of imagination could ever form part of the estate of the deceased. It was, however, mentioned in paragraph No. 20 of the said judgment that the right of the respondent herein to such estate of the deceased would undoubtedly depend on the outcome of the probate proceeding, i.e., Title Suit (P) No. 43/2010 pending before the Court of the District Judge, Sonitpur, Tezpur. The relevant portion of the said judgment passed by this Court, i.e., paragraph Nos. 19, 20 & 21 are quoted herein below:

“19. Applying the ratio of the decisions referred to herein above to the facts of this case, I am of the considered opinion that since the respondent No.6 cannot be treated as the legally married wife of Late Dr. Soumendra Mohan Mukherjee hence she would not meet the requirement of Rule 143(i) of the Rules of 1969. As such, no family pension can be paid to the respondent No.6.

20. In so far as other properties of the deceased included in the Will dated 18.11.2006 is concerned, the right of the respondent No.6 to such estate of the deceased would undoubtedly depend on the outcome of the probate proceeding viz., Title Suit(P) No.43/2010 pending before the learned District Judge, Sonitpur and therefore, the said aspect of the matter need not be gone into in the present proceeding.

21. In view of what has been held above, it is hereby directed that the respondents would take necessary steps to make payment of family pension to the writ petitioner. It is, however, made clear that having regard to the peculiar facts of this case and for the

ends of justice, no recovery shall be made from the respondent No.6 in respect of family pension that has already been paid to her before the issuance of the interim order dated 24.08.2018 passed by this Court.”

5. It further appears that the petitioner herein had again approached this Court on the ground that the Court of the District Judge, Sonitpur, Tezpur had rejected the prayer of segregating the issue of family pension out of the fold of testamentary disposition. The record shows that the petitioner initially came up before this Court in CRP(IO) No.93/2018 which was withdrawn on 28.03.2018 with liberty to move an application before the trial court for striking off the issues. Thereafter, the petitioner again came up before this Court in CRP(IO) No. 382/2018, but the same was again withdrawn on the ground that no application was filed as per the leave granted in order dated 28.03.2018 passed in CRP(IO) No.93/2018. The CRP(IO) No.382/2018, as stated herein above, was withdrawn on 22.11.2018 with liberty to approach the Court of the District Judge by filing appropriate application for striking off the issues and this Court closed the said revision application on withdrawal with the liberty as prayed for.

6. The record further shows that on 20.07.2019, a petition vide No.1201/2019 was filed under Section 151 of the CPC for expunging the *ex-parte* evidence of the three witnesses for the respondent herein being objectionable/scandalous. The Court of the District Judge, Sonitpur vide the order dated 16.06.2020 had rejected the said petition. Being aggrieved by the said order dated 16.06.2020, the petitioner herein filed CRP(IO) No. 139/2020. This Court vide an order dated 04.01.2021 was of the opinion that the order dated 16.06.2020 passed by the District Judge, Sonitpur, Tezpur in T.S.(P) No.43/2010 passed in petition No. 1201/2019 dated 20.07.2019 did not suffer from any jurisdictional error.

7. At this stage, taking into account the question involved in the instant proceeding, it would be relevant to take note that vide the petition No.1201/2019 dated 20.07.2019, the petitioner herein sought for expunging the evidence of three witnesses on the ground

that the respondent cannot claim to be the legally married wife, and as such, the use of the word “wife of the testator” was objectionable, and therefore, was required to be expunged being scandalous. This Court while adjudicating the said proceeding, i.e., CRP(IO) No. 139/2020 raised the query upon the counsel representing the petitioner as to whether after the pronouncement of the order dated 26.09.2018 in WP(C) No.1328/2016, the petitioner herein had amended her written statement. This Court taking into account that the petitioner had not relied upon the judgment in WP(C) No.1328/2016 in her written statement was of the opinion that there was no jurisdictional error in findings recorded by the trial court to the effect that the petitioner/defendant had failed to clarify as to how the defendant is going to be prejudice, if the evidence of the plaintiff’s witnesses is not expunged. Further to that, this Court also observed that as the evidence on affidavit was filed on 27.03.2014, much prior to the date of the judgment dated 26.09.2018 in WP(C) No. 1328/2016, this Court was not inclined to form an opinion that the contents of the said affidavits were scandalous so as to invoke the provision of order XVI Rule 14 of the CPC. At this stage, it may not be out of place to mention that Order VI Rule 16 of the CPC is in relation to striking out pleadings and not evidence and Order XIV Rule 5 of the CPC is the power to amend and strike out issues. The question of expunging the evidence on affidavit on the ground of it being scandalous as alleged, is totally foreign to the scope and ambit of the CPC.

8. On the basis of the order dated 04.01.2021, the petitioner after two months, filed an application under Order VI Rule 17 of the CPC seeking amendment of the written statement. The basis of the said application was moved on the ground that the subsequent events pertaining to the order passed on 26.09.2018 in WP(C) No. 1328/2016, was required to be inserted in the written statement wherein this Court had held that the petitioner was the legally married wife of late Dr. Soumendra Mohan Mukherjee and is entitled to family pension and the respondent herein is not the legally

married wife of late Dr. Soumendra Mohan Mukherjee and that she has got no right to claim family pension. On the basis of that, three paragraphs were sought to be added to the written statement. The said paragraphs were paragraph Nos. 5A, 5B & 6A.

9. Conjoint reading of the additional written statement filed on 26.08.2014 with paragraph Nos. 5A & 5B which were sought to be inserted would show that the proposed averments sought to be inserted through paragraph Nos. 5A & 5B were also a part of the additional written statement filed on 26.08.2014 except the effect of the order dated 26.09.2018 passed by this Court in WP(C) No.1328/2016 was additionally included.

10. It is also be relevant herein to mention that after filing of the said application under Order VI Rule 17 of the CPC seeking amendment of the written statement, an undertaking was filed on 05.03.2022 that the petitioner shall not file any other amendment petition for amending the written statement under Order VI Rule 17 if the amendment petition, i.e., petition No.484/2021 is allowed.

11. The Court of the District Judge, Sonitpur, Tezpur, vide an order dated 17.03.2022, rejected the said petition. In doing so, the learned court below took into account the judgment and order passed by this Court on 26.09.2018 in WP(C) No. 1328/2016. The learned court below further observed that the point required to be decided by the court in the probate proceeding is to decide as to whether the WILL in question is genuine or not or as to whether the WILL in question was duly executed or not. It was also observed that the point raised by the defendant/petitioner herein by way of seeking amendment in the written statement is a point open for the defendant to take and nothing bars the defendant from taking this point during the course of the proceeding which have already been raised and for this purpose, amendment sought by the defendant is not at all required for the purpose of deciding the case. The court below further took into account as to how the defendant's action has resulted in the delay of the probate proceedings. It has further observed that a careful perusal of the original written objection filed on

02.07.2010 and the written statement dated 19.08.2014 filed on 26.08.2014 reveals that the pleas taken by the defendant in the proposed amendment of the written statement has already been taken in the earlier written statement dated 19.08.2014 in substance. It was also observed that the said probate proceeding has already taken 11 years 11 months 28 days since the date of filing and the respondent herein who was 57 years old as on the date of filing of the said probate proceeding is now 69 years old. It is under such circumstances that the Court of the District Judge had dismissed the said petition seeking amendment with exemplary cost of Rs.1 lakh to be paid within a month from the said order. Accordingly, the court below further directed the plaintiff to produce evidence on the next date fixed for cross-examination by the defendant. It is against this order dated 17.03.2022 that the petitioner is before this Court under Article 227 of the Constitution of India.

12. Mr. D. Das, the learned senior counsel for the petitioner submitted that the amendment was necessitated in view of the observation being made in the order dated 04.01.2021 passed in CRP(IO) No. 139/2020 wherein this Court had observed that when the petitioner herein had not relied on the judgment dated 26.09.2018 in WP(C) No. 1328/2016, there was no jurisdictional error on the part of the trial court in the findings recorded by it to the effect that the petitioner had failed to clarify as to how the petitioner is going to be prejudiced if the evidence of the plaintiff witnesses have not been expunged. Mr. D. Das, the learned senior counsel further submitted that on account of the said observation being made, the petitioner had no other option but to seek amendment of the written statement. The learned counsel further submitted that the order was passed on 04.01.2021 and immediately thereafter on 01.03.2021, the said application was filed seeking amendment of the written statement.

13. On the other hand, Mr. S. K. Singh, the learned senior counsel appearing on behalf of the respondent submitted that the judgment dated 26.09.2018 in WP(C) No. 1328/2016 has not been challenged by the respondent in any further proceedings

inasmuch as the respondent duly admits that she is not entitled to the family pension as she is not the first wife. The learned counsel for the respondent, referring to paragraph No. 20 of the said judgment dated 26.09.2018 in WP(C) No. 1328/2016, submitted that this Court had in respect to other properties of the deceased included in the WILL dated 18.11.2006 had clearly held that the same would be subject to the outcome of the proceeding in T.S.(P) No. 43/2010 and as such the question of amendment does not arise at all. The learned counsel for the respondent further submitted that a perusal of the impugned order would also show that the very aspect of the matter was duly taken into consideration by the trial court wherein it has been mentioned that the point raised by the petitioner herein by way of seeking amendment in the written statement is a point open for the petitioner to take and nothing bars the petitioner from taking this point during the course of the proceeding which has already been raised. Mr. S. K. Singh, the learned senior counsel, therefore, submitted that the question of amendment of the written statement does not arise in the facts and circumstances of the case. It was further submitted that the learned trial court had duly taken into consideration the manner in which the petitioner has resorted to all means to delay the proceedings. Out of the three witnesses who have adduced evidence in the year 2010, one witness has already expired and one witness is presently ailing and the basic intention behind the filing of petition after petition is only for the purpose of delaying the probate proceedings so that the entire proceedings could be frustrated. The learned senior counsel for the respondent, further in support of the imposition of cost of Rs.1 lakh, submitted that the court below was justified in imposing the cost of Rs.1 lakh taking into consideration that the petitioner herein has resorted to all means only to delay and frustrate the probate proceeding, and as such, the imposition of cost of Rs.1 lakh was just and appropriate in the facts of the instant case.

14. I have heard the learned counsel for the parties and also perused the materials on record. A perusal of the purported WILL dated 18.11.2006 states that the respondent

would be the sole beneficiary of the pension and will be the sole owner of the testator, landed and house property including bank deposit, investment, life insurance and other savings. But the judgment passed by this Court on 26.09.2018 in WP(C) No. 1328/2016 had categorically taken into consideration as to whether the special family pension can be bequeathed by means of a WILL. In doing so, this Court held that family pension and gratuity payable to a deceased employee under the Pension Rules cannot be bequeathed by means of a WILL so as to deprive the legal heirs who would come within the definition of family under the relevant Rules as the right to receive family pension shall be governed by the provision of the Rules, and in the instant case, the Assam Pension Rules of 1969. The judgment of this Court dated 26.09.2018 had attained finality and as such irrespective of whether the petitioner herein amends the written statement or not, the respondent would not be entitled to the family pension of late Dr. Soumendra Mohan Mukherjee. This Court, further, in the said judgment at paragraph No. 20 has also categorically mentioned that so far as the other properties of the deceased, i.e., late Dr. Soumendra Mohan Mukherjee included in the WILL dated 18.11.2006 is concerned, the right of the respondent herein to such estate of the deceased would undoubtedly depend on the outcome of the probate proceeding, viz., T.S.(P) No.43/2010 pending before the District Judge, Sonitpur, Tezpur.

15. In a recent order passed by the Supreme Court in the case of *Saroja Ammal Vs. M. Deena Dayalan and others*, reported in MANU/SCOR/32136/2022 delivered on 08.04.2022, the Supreme Court had held that the question as to whether a person was the legally wedded wife or not or was in an illicit relationship was not germane to decide whether the WILL propounded by her is true, genuine and valid. It is further observed that if a person is able to prove the WILL was executed by testator in sound and disposing state of mind, the person would be entitled to the relief. Further to that, it was also held that an absolute owner of a property is entitled even to bequeath his property in favour of strangers. Paragraph Nos. 11 and 20 of the said order, being relevant, is quoted

herein below:

“11. At the outset we should say that the question whether the appellant was the legally wedded wife or was in an illicit relationship is not germane to decide whether the Will propounded by her is true, genuine and valid. In fact this position has been understood clearly by the High Court, as seen from paragraph 12 of the impugned judgment, where the High Court has stated that irrespective of whether the plaintiff was the wife of Munisamy Chettiar or not, she will be entitled to the relief of declaration and injunction, if she was able to prove that the Will was executed by the testator in a sound and disposing state of mind. Therefore, it is enough for us to confine our discussion only to the second question of law framed by the High Court for consideration.

20. Similarly the decision in Indra Sarma (supra) relied upon by the learned senior counsel for the first respondent, arose out of a question whether a live-in relationship would amount to a domestic relationship within the meaning of the said expression under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005. This decision will not take the first respondent anywhere, since the absolute owner of a property is entitled even to bequeath his properties in favour of strangers.”

16. In the backdrop of the above, if this Court takes into account the application which was filed by the petitioner herein under Order VI Rule 17 of the CPC for amendment of the written statement, it would be seen that the said application is on the face of it unnecessary and irrelevant. More so, this Court vide its judgment dated 26.09.2018 in WP(C) No.1328/2016 has categorically held that family pension and gratuity payable to a deceased employee cannot be bequeathed by way of a WILL.

17. The second aspect of the matter which also needs to be looked into as would transpire from the averments put forth in proposed paragraph Nos. 5A & 5B are that the said allegations are already there in the additional written statement dated 19.08.2014 filed on 26.08.2014. In view of the above mentioned order of the Supreme Court in *Saroja Ammal (supra)* as well as also the paragraph No.20 of the judgment dated 26.08.2018 in WP(C) No.1328/2016, the question as to whether the respondent is the legally married wife or not therefore has no relevance inasmuch as a testator who is the

absolute owner of his property is entitled to bequeath his property in favour of any person whom he or she desires. Therefore, the above would show that the amendment sought for is not necessary for determining the real question in controversy between the parties.

18. Now coming to the impugned judgment it would be seen that the court below had also taken into consideration the said aspect of the matter as would be seen from the below quoted portion of the judgment of the court below:

“The point required to be decided by this court in the instant probate proceeding is to decide whether the WILL in question is genuine or not, or whether the WILL in question was duly executed or not but while deciding so, this court is not required to ponder upon who is the first wife or who is the second wife of deceased Dr. Soumendra Mohan Mukherjee. The point raised by the defendant by way of seeking amendment in the written statement is a point open for the defendant to take and nothing bars the defendant from taking this point during the course of the proceedings, which has already been raised and for this purpose amendment sought by the defendant is not at all required for the purpose of deciding the case.”

19. Under such circumstances, this Court does not find any infirmity in the judgment passed by the trial court as regards the rejection of the application under Order VI Rule 17 of the Code.

20. Next question which arises as to whether the court below was justified in imposing the cost of Rs.1 lakh. The materials before this Court show that on 04.01.2021, this Court in CRP(IO) No.139/2020 made an observation that when the petitioner had not relied on the judgment in WP(C) No.1328/2016 in her written statement, the Court finds no jurisdictional error in the findings recorded by the trial court to the effect that the petitioner has failed to clarify as to how the petitioner is going to be prejudice if evidence of the plaintiff witnesses is not expunged. This observation, as per the writ petitioner had necessitated in the filing of the application under Order VI Rule 17 of the CPC for which on 01.03.2021 itself the said application under Order VI Rule 17 was

filed. A perusal of the impugned order shows that the court below had taken into consideration while rejecting the said application and imposing the cost of Rs.1 lakh, the entire proceedings which led to the delay in disposal of the probate proceedings which in the opinion of this Court was not germane for the imposition of cost in respect to an application under Order VI Rule 17 of the Code. There is no doubt that there is a delay in the disposal of the probate proceeding which has resulted on account of various litigations being filed before this Court but the petitioner could not have been penalized with a cost of Rs.1 lakh for filing an application under Order VI Rule 17 inasmuch as the said application as per the petitioner was necessitated in view of the observation made by this Court in its order dated 04.01.2021. Consequently, this Court, therefore, while upholding the impugned order dated 17.03.2022 interferes with the said order in so far as the imposition of cost of Rs.1 lakh.

21. A perusal of the record as well as the impugned order dated 17.03.2022 shows that there has been an inordinate delay in the disposal of the probate proceedings. This Court is also concerned with the delay in the disposal of the probate proceedings which was filed on 20.03.2010. The evidence on affidavits of three witnesses were filed on 27.04.2010 to prove the WILL of late Dr. Soumendra Mohan Mukherjee dated 18.11.2006. Out of the three witnesses, one witness has already expired and any further delay in the disposal of the probate proceeding may result in frustration of the entire probate proceedings. Consequently, therefore, this Court in exercise of the powers under Article 227 of the Constitution of India directs the following:-

- (i) The parties shall appear before the Court of the District Judge, Sonitpur, Tezpur on **21.06.2022**. On the said date, the respondent herein who is the plaintiff in T.S.(P) No. 43/2010, shall produce her witnesses for cross-examination at **10.30 AM**.
- (ii) The Court of the District Judge, Sonitpur, Tezpur is directed to take up the said probate proceeding as the first item of the day so that the cross-



examination of the plaintiff witnesses can be done. If for some reasons the cross-examination could not be done or completed, the court below shall take up the matter on the next date as the first item and continue henceforth till the cross-examination of the plaintiff witnesses are completed. The said cross-examination is directed to be taken on day-to-day basis till it is not completed.

(iii) It is further made clear that if there is any objection raised as regard the admissibility of the evidence tendered, the court below shall take it up for consideration at the final argument of the suit.

(iv) It is further directed that after completion of the cross-examination, the court below shall dispose of the said probate proceedings as expeditiously as possible and preferably within a period of **3 (three) months** from 21.06.2022.

(v) During the said trial, if any of the parties are aggrieved by any order being passed, which are not otherwise appealable under the Code of the Civil Procedure, the parties shall be at liberty to raise objection to such order in terms with Section 105 of the CPC.

22. With the above observations and direction, the instant petition stands disposed of.

23. The Registry is directed to forthwith communicate this order to the learned Court of the District Judge, Sonitpur, Tezpur.

JUDGE

Comparing Assistant