AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP Nos.1626 and 1627 OF 2016

(Applications under Article 227 of the Constitution of India)

******

Rabindra Moharana and others .... ***Petitioners***

-versus-

Sulochana Bewa and others .... ***Opp. Parties***

Advocates appeared:

For Petitioners : Mr. Bibekananda Bhuyan, Advocate

For Opp. Parties : Mr. Surya Prasad Misra, Senor Advocate being assisted by Ms. E.Agarwal, Advocate (For Opposite Party Nos.1, 2 and 11)

CORAM:
JUSTICE K.R. MOHAPATRA

Date of judgment : 01.05.2024

J U D G M E N T

1. This matter is taken up through hybrid mode.

2. A composite order dated 21st September, 2016 passed by learned Civil Judge (Senior Division), 1st Court, Cuttack in OS No.6 of 2015 is under challenge in both the CMPs, whereby two applications, one filed by the Petitioners on 12th May, 2016 for substitution of deceased Petitioner No.2, namely, Sadananda Maharana was dismissed and another petition dated 30th June, 2016 filed by Opposite Parties was allowed holding the proceeding to be not maintainable.

3. Since both the CMPs involve similar questions of facts and law, those are taken up together for the sake of convenience of discussion.

4. Facts in nutshell necessary for adjudication of these CMPs are that one Saria Bewa executed her last WILL on 15th December, 1984 in favour of one Trailokya Maharana and Sadananada Maharana, both are sons of Bhikari Maharana. After death of Saria Bewa, said Trailokya Maharana and Sadananda Maharana filed Misc. Case No.26 of 1992 before learned District Judge, Cuttack under Section 278 of the Indian Succession Act, 1925 (for brevity 'the Act') for grant of Letters of Administration. Upon receipt of summons, the Opposite Parties appeared. During pendency of the proceeding, Trailokya Maharana died on 12th December, 2002 and his legal heirs (LRs) were brought on record by substitution. Since the matter became contentious, case record was transferred to learned Civil Judge (Senior Division), 1st Court, Cuttack to adjudicate the proceeding. Accordingly, it was registered as OS No.6 of 2015. During pendency of the proceeding, Sadananda Maharana died on 12th March, 2016. Thus, an application was filed on 12th May, 2016 under Order XXII Rule 3 CPC for substitution of deceased Sadananda Maharana. The said application was objected to by the Opposite Parties by filing objection. Likewise, the Opposite Parties also filed an application on 30th June, 2016 alleging that due to death of Trailokya and Sadananda, namely, both the executors of the

WILL the Probate proceeding cannot survive and the same being not maintainable is liable to be dismissed. Learned trial Court heard both the applications and passed a composite order holding that in view of Section 222 of the Act, Probate can be granted only to an executor. Since the Probate proceeding was initiated at the instance of the executors so named in the WILL, it would survive till the executors are alive. The Probate proceeding is co-terminus with the death of the executors, as there would be no occasion to grant any Probate. In such situation, the Probate proceeding suffers a natural death. It is further observed that after being contentious, a Probate proceeding is tried like a suit, but that does not transform the proceeding into a suit under the Code of Civil Procedure, 1908 in view of Section 222 of the Act. Hence, learned trial Court dismissed the petition filed under Order XXII Rule 3 CPC for substitution of the LRs of deceased Sadananda and consequently allowed the petition filed by Opposite Parties holding that the Probate proceeding to be not maintainable. Being aggrieved, these CMPs have been filed.

5. Learned counsel for the parties do not dispute the aforesaid factual position.

6. Mr. Bhuyan, learned counsel for the Petitioners opened his argument submitting that learned trial Court proceeded on misconception that the proceeding has been filed to probate the WILL. But the proceeding was in fact filed for grant of Letters of Administration. Had it been filed for grant of Probate, it would

have been terminated on the death of both the executors of the WILL in view of Section 222 of the Act. But in the instant case, the testatrix had not appointed any executor of the WILL. Being incognizant of the fact that Trailokya and Sadananda filed application under Section 278 of the Act for grant of Letters of Administration, learned trial Court misconstruing it to be a proceeding under Section 276 of the Act, passed the impugned order. Unlike a proceeding under Section 276 of the Act, substitution of the Petitioner is permissible in a proceeding under Section 278 of the Act. Section 222 of the Act only applies to the proceeding under Section 276 of the Act. It has no application to a proceeding for grant of letters of Administration under Section 278 of the Act. Thus, learned trial Court has erred in law in rejecting the petition filed under Order XXII Rule 3 CPC and holding the proceeding not maintainable after death of Trailokya and Sadananda.

6.1 Mr. Bhuyan, learned counsel for the Petitioners relied upon the case of ***Soundararaja Peter and others Vs Florance Chellaih and others***, reported in AIR 1975 Madras 194, wherein, it is held as under:-

> *"**6.** S.232 applies to a case where the testator has not appointed an executor. The Section states that where an executor has not been appointed under a will or the executor appointed is incapable of or has refused to act or has died before the testator or before proving the will, an universal or residuary legatee may be admitted to prove the will, and Letters of Administration with the will annexed may be granted to him of the estate. S. 235 provides that Letters of Administration with the will annexed shall not be granted to any legatee other than*

> *an universal or a residuary legatee, until a citation has been issued and published in the manner prescribed by the provisions of that Act. Mr. Parasaran contends that though Letters of Administration could be granted under S. 232 to an universal or a residuary legatee, the plaintiff not being an universal or a residuary legatee, is not entitled to the Letters of Administration under the said provision. It is also further pointed out that no citation having been issued or published in the manner prescribed by the Indian Succession Act, no Letters of Administration could be issued to the plaintiff even if she is treated as an universal or a residuary legatee in view of the prohibition contained in S. 233. It is true that the plaintiff is not an universal or a residuary legatee under the terms of the will Ex. A-1. She is one of the four legatees under the terms of the will Ex. A-1, and all the properties covered by the will have been bequeathed to them and there is no residue to be administered. We do not understand the provisions in S. 232 as enabling only a residuary or an universal legatee to prove the Will and claim Letters of Administration. S. 234 specifically provides that any legatee having a beneficial interest may also prove the will and seek a Letters of Administration. The plaintiff being a legatee under the will, and there being no universal or residuary legatee, the provisions of S. 234 will come into play. The plaintiff it therefore, entitled to prove the will and get Letters of Administration in relation to that will."*

He, therefore, submits that when no executor has been appointed under the WILL, a proceeding under Section 278 of the Act is maintainable. He also relied upon the case of ***Jadeja Pravinsinhji Anandsinhji Vs Jadeja Mangalsinhji Shivsinhji and others***, reported in AIR 1963 Guj 32, wherein, it is held that even in a Probate proceeding under Section 276 of the Act, upon death of the executor, it can be converted to a proceeding under Section 278 of the Act for grant of Letters of Administration and be continued by the residual or universal legatee. He also relies

on a decision in the case of ***Lallubhai Chhotabhai by L.Rs. and others Vs Vithalbhai Parshottambhai***, AIR 1982 Guj 222, wherein, it is held at para-16 as under:-

> *"**16.** In Dilip Kumar v. Subhadra, AIR 1974 Orissa 130 and Soundararaja Peter v. Florance Chellaihi, AIR 1975 Mad 194, the grant of letters of administration with the will annexed was found to be the proper remedy when it was found that probate could not be granted as no executor was appointed by the will. Under the circumstances having regard to the fact that we have found that the respondent is a universal legatee and in view of the fact that the finding with regard to the proof of the will is not in question, we are inclined to remand the matter to the District Court with a direction that letters of administration with the will annexed should be granted to the respondent as alternatively prayed by him."*

He also placed reliance on the case of ***Dillip Kumar Mohapatra*** Vs. ***Subhadra and others***, reported AIR 1974 Orissa 130, wherein it is held as under :-

> "10 *Even on these findings the appellant would not be entitled to probate of the will. On examination of Ext. 1, we do not find that any executor had been appointed by the will. Section 222 of the Indian Succession Act provides:—.*
>
> *(1) Probate shall be granted only to an executor appointed by the will.*
>
> *(2) The appointment may be expressed or by necessary implication."*
>
> *We do not find any material in the will itself from which we can hold that an executor had been appointed by necessary implication. Mr. Pal relied upon Kamalamma v. Somasekharappa, AIR 1963 Mys 136; S. Venkatarama Iyer v. Sundarambal, AIR 1940 Bom 400; Arumilli Viramma v. Arumilli Seshamma, AIR 1931 Mad 343 in support of the contention that the appellant by necessary implication may be taken to have been appointed as the executor. We find nothing useful in the first two cases to support Mr. Pal's contention and the Madras case had a different set of facts on the basis of which the principle of appointment by implication was*

> *found applicable. Consequently, probate cannot be granted. On the other hand, it would be appropriate, on our finding regarding the will to grant letters of administration with the will annexed to the legatee as provided under Section 232 of the Succession Act."*

It is, therefore, contended that the nature and character of the proceeding has to be looked into while considering the application either for probate or grant of letters of administration. When no executor has been appointed, a Letters of Administration with the WILL can be granted to the residual or universal legatee, which includes its LRs. He, therefore, submits that the impugned order in rejecting the petition under Order XXII Rule 3 CPC as well as allowing the petition holding the proceeding itself to be not maintainable is illegal and unjustified. Hence, he prays for setting aside the impugned order and to remit the matter to substitute the LRs. of deceased Sadananda therein and continue with the proceeding for grant of letters of administration.

7. Mr. Mishra, learned Senior Advocate appearing for the contesting Opposite Parties defending the impugned order submitted that Trailokya and Sadananda were appointed as executors of the WILL. The contents of the WILL itself makes the same manifest. It has been stated in the WILL that upon death of the testatrix, Trailokya and Sadananda would probate the WILL to get the benefit out of it. In effect, Trailokya and Sadananda filed the proceeding for probate of the WILL as its executors. Trailokya died on 12th December, 2002 and his legal

heirs were substituted in his place. During pendency of the proceeding before learned Civil Judge (Senior Division), 1st Court, Cuttack, Sadananda died on 12th March, 2016. Thus, both the executors of the WILL having died in the meantime, the legal heirs of Trailokya although substituted are not competent to continue the proceeding to get a Probate. In view of Section 222 of the Act, legal heirs of Sadananda cannot be substituted in his place, as the proceeding has already met its natural death and is no more available to be converted to a proceeding for grant of letters of administration. As such, learned trial Court has committed no error in dismissing the petition filed under Order XXII Rule 3 CPC for substitution of legal heirs of Sadananda. It is his submission that when the WILL itself gave authority to Trailokya and Sadananda to probate the WILL, a proceeding at their instance for grant of Letters of Administration is not maintainable. Learned counsel for the Petitioners tried to mislead this Hon'ble Court by portraying the proceeding to be one for grant of letters of administration. Although the proceeding has been filed under Section 278 of the Act, but in effect it was a proceeding for grant of probate and has come to an end with death of both the executors. Thus, learned trial Court has not committed any error in dismissing the petition under Order XXII Rule 3 CPC and holding the proceeding no maintainable, allowing the prayer of Opposite Parties. He, therefore, submitted that both the CMPs being devoid of any merit should be dismissed.

7.1 In course of hearing, Mr. Mishra, learned Senior Advocate, however, submitted that the correct position of law has been laid down in the following case laws:-

i) ***Musammat Phekni Vs. Musammat Manki***, reported in AIR 1930 Patna 618;

ii) ***Smt. Sushilabai Vs. Govind Ganesh Khare***, reported in AIR 1958 MP 372;

iii) ***Jadeja Pravinsinhji Anandsinhji Vs. Jadeja Mangalsinhji Shivsinhji and others***, report in ARIR 1963 Guj 32;

iii) ***Govind M. Asrani Vs. Jairam Asrani and another***, reported in AIR 1963 Madras 456;

iv) ***Jogendra Prasad alias Bhola and others Vs. Kamlesh Kumar and others***, reported in AIR 2001 Pat 181;

v) ***Thrity Sam Shroff Vs. Shiraz Byramji Anklesaria***, reported in AIR 2007 Bom 103;

He, however, submitted that law is no more *res integra* that in view of Section 232 of the Act, if an executor dies before grant of Probate of the WILL, the residuary or universal legatee may continue the proceeding to grant letters of administration. The said aspect was not taken into consideration by learned trial Court while adjudicating the matter. He, therefore, submitted that interest of justice will be best served if learned trial Court gives a relook to the facts and circumstances of the case and adjudicate the matter afresh.

8. Heard learned counsel for the parties and perused the materials on record. The Act makes elaborate provisions for

probate and/or grant of Letters of Administration with the WILL. On perusal of the document, namely, WILL at Flag- 'C' of the brief, it is clear that the testatrix, namely, Saria Bewa made her last WILL in favour of Trailokya and Sadananda in respect of the properties more fully described therein indicating *inter alia* that they will take care of the testatrix during her life time and perform her obsequies and other rituals. After her death, they would get the probate of the WILL in competent Court of law. Accordingly, an application under Section 278 of the Act was filed before learned District Judge, Cuttack for grant of Letters of Administration, which was registered as Misc. Case No.26 of 1992. During pendency of the proceeding before learned District Judge, Cuttack, Trailokya Maharana died on 12th December, 2002 and his legal heirs were substituted. The proceeding on being contentious, was transferred to learned Civil Judge, Senior Division, 1st Court Cuttack for adjudication and is registered as OS No.6 of 2015. During pendency of the proceeding, Sadananda died on 12th March, 2016. Thus, an application was filed under Order XXII Rule 3 CPC for his substitution. The Opposite Parties also filed an application to dismiss the proceeding being not maintainable on the ground that upon death of both the executors of the WILL, the proceeding has come to an end automatically in view of Section 222 of the Act. Both the applications were taken up and disposed of by a composite order, which is impugned in both the CMPs.

9. Upon hearing learned counsel for the parties, following issues cropped up for adjudication.

i) *Whether OS No.6 of 2015 is a proceeding for grant of probate or grant of Letters of Administration?*

ii) *Whether the proceeding survives after death of both the legatees, namely, Trailokya and Sadananda?*

10. The petition in Misc. Case No.26 of 1992 filed under Section 278 of the Act in the Court of learned District Judge, Cuttack with the following prayer:-

> *"The petitioners therefore pray that letters of administration of the Estate of Saria Bewa deceased with the Will annexed be granted to the petitioners;*
> *And for this act of kindness the petitioners as in duty bound shall ever pray."*

The contents of the petition filed by both the beneficiaries of the WILL as well as relief claimed therein clearly disclose that it was for grant of letters of administration and not for probate.

11. Section 222 of the Act has made it clear that a probate of WILL can be granted only to the executor appointed by the WILL. Sub-section (2) of Section 222 of the Act clarifies that the appointment of an executor may be in express terms or by necessary implication. In the instant case, the language of the WILL (at Flag-'C' of CMP No.1626 of 2016) clearly indicates that the testatrix expressly appointed Trailokya and Sadananda as executors to probate the WILL in competent Court of law. Thus, the submission of Mr. Bhuyan, learned counsel for the Petitioners that no executors were appointed by the WILL, is not correct. Upon death of Trailokya, his legal heirs have already been substituted. The impugned order came to be passed when learned

trial Court dealt with an application under Order XXII Rule 3 CPC for substitution of deceased Sadananda. Although the WILL authorized Trailokya and Sadananda to move the competent Court of law for grant of probate, but an application under Section 278 for grant of letters of administration has been filed by both of them. Grant of probate under Section 276 of the Act should not be confused with grant of Letters of Administration. There cannot be any quarrel on the position of law that a Probate of the WILL can only be granted to an executor appointed by the said WILL, but the said principles is not applicable to an application for grant of Letters of Administration under Section 278 of the Act. For administration of the estate of the testator, a petition for grant of letters of administration with the WILL can be made even if no executor has been appointed.

11.1 Section 232 of the Act reads as under:-

> *"**232. Grant of administration to universal or residuary legatees.**—When—*
>
> *(a) the deceased has made a will, but has not appointed an executor, or*
>
> *(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or*
>
> *(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased, an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."*

The provision makes it abundantly clear that even a universal or residuary legatee may be admitted to prove the WILL and Letters of Administration with the WILL may be granted to him

of the whole estate or of so much thereof as may be unadministered. Thus, in absence of an executor, a proceeding for grant of Letters of Administration can be maintained and continued by the universal or residuary legatee. The residuary legatee has been described under Section 102 of the Act. It reads as under:-

> *"102. Constitution of residuary legatee.—A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property."*

On the other hand, a universal legatee is one who, by virtue of the WILL is entitled to whole of the testator's property. Further, Section 234 of the Act makes it explicit that when there is no executor and no residuary legatee or representative of a residuary legatee or he declines or incapable to act, or cannot be found, the person(s) who would be entitled to the administration of the entire estate of the deceased, if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the WIL, and Letters of Administration may be granted to him or them accordingly. Keeping in mind the aforesaid principles, the cases at hand require consideration.

11.2 The instant case being not case under Section 276 of the Act, as discussed earlier and the proceeding being under Section 278 of the Act, the restriction under Section 222 of the Act is not applicable. In view of the above, the proceeding does not come to an end on the death of the executors, as contended by Mr. Mishra,

learned Senior Advocate for the contesting Opposite Parties. In the case of ***Jadeja Pravinsinhji Anandsinhji (supra)***, Gujarat High Cour reiterated the principles under Section 232 of the Act. In the case of ***Pramodini Pattnaik (since dead) Vs. Smt. Jayashree Tarai and another***, reported in 2015 SCC Online Ori 491, this Court discussing the provisions under Section 211 of the Act, held as under:-

> *"10. Section 211 thus postulates the executor or administrator, as the case may be, of a deceased person, is his 'legal representative' for all purposes with regard to property covered under the testament, i.e., the Will. However, Section 213 of the Act makes it clear that no right as executor or legatee can be established in any Court of justice unless a Court of competent jurisdiction in India grants probate of the Will under which the right is claimed by the executor or the legatee. Section 2(11) of the CPC defines 'legal representative' as follows:-*
>
> > *"2(11) "Legal Representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"*
>
> *11. It emanates from the definition that legal representative is a person, who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. From the provisions of law as discussed above, it is to be seen as to whether the petitioner, who is undisputedly the executor of the Will dated 24.10.2005, can be treated to be the legal representative of the sole deceased appellant. It leaves no room for doubt that the legal representative is only entitled to continue the suit or appeal, as the case may be, on the basis of the claim laid by the deceased plaintiff and/or appellant……"*

In the instant case, both Trailokya and Sadananda are the universal legatees. In view of the provisions of the Act and case

law discussed above, it can be safely said that a legatee includes his/her legal representative also. Thus, applying the principles in the case of ***Pramodini Pattanaik (supra),*** the Petitioners being the legal representatives of Sadananda, are competent to maintain and continue the proceeding for grant of Letters of Administration including the legal heirs of Trailokya, who have already been substituted.

11.3 Although Mr. Mishra, learned Senior Advocate contended that Trailokya and Sadananda were granted authority to probate the WILL only, but law does not prohibit them to file an application under Section 278 of the Act for grant of Letters of Administration. Even in a proceeding under Section 276 of the Act for grant of probate, the Court is competent in the facts and circumstances of a particular case to grant Letters of Administration, as would be clear from the ratio in the case of ***Dillip Kumar Mohapatra (supra)***. In the said case law, this Court observing in the fact and circumstances of the said case that no Probate can be granted, held that it would be appropriate for the Court to grant Letters of Administration with the WILL annexed, to the legatee under Section 232 of the Act. Provisions under Order XXII CPC is not strictly applicable to the provisions under the Act. But the principles laid down therein has application to the principles enumerated therein may be followed to regularize and to continue the proceeding under the provisions under the Act. As discussed earlier, a legatee includes his or her legal representative also. Thus, learned trial

Court committed an error in refusing to substitute the legal heirs of Saria Bewa.

12. In view of the above, this Court answering the issue No.(i) holds that the proceedings in OS No.6 of 2015 is a proceeding for grant of Letters of Administration and not a Probate proceeding. In answer to the issue No.(ii), this Court holds that the legal representatives of Sadananda so also Trailokya can maintain and continue the proceeding filed under Section 278 of the Act. Hence, the composite impugned order dismissing the application under Order XXII Rule 3 CPC as well as allowing the application filed by the Opposite Parties to dismiss the probate proceeding as not maintainable, is set aside.

12.1 OS No.6 of 2015 is restored to file and the matter is remitted to learned Civil Judge (Senior Division), 1st Court, Cuttack to adjudicate the matter in accordance with law by bringing on record the legal representatives of Sadananda.

13. Both the CMPs are allowed to the aforesaid extent. However, in the facts and circumstances, there shall be no order as to costs.

Issue urgent certified copy of the Judgment on proper application.

(K.R. Mohapatra)
Judge

Orissa High Court, Cuttack,
Dated 1st May, 2024/s.s.satapathy