

Assam Schedule VII. Form No.132.

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE

District - **Dhubri**

In the Court of the **District Judge, Dhubri**

Present : **Sri R. Goswami, A.J.S.**
District Judge, Dhubri

Monday, the **28th** day of **November, 2016**

Misc.(P) No. 95/2014

Abdul Mozid Sk. - Petitioner
- Versus-

1. Nur Hussain Sk.
2. Abdul Motleb Sk.
- Opp. Parties.

* Give date or dates This Suit/ Case coming for final hearing on
15-11-2016

In the presence of

Sri N.A. Sk, Advocate ----- for Petitioner

Sri U.K. Dutta, Advocate ----- for Opp. Parties

and having stood for consideration to this day, the
Court delivered the following judgment :-

J U D G M E N T

The petitioner's case in brief is that Monser Ali Sk. deceased father of the petitioner and the OPs had executed a Will, bequeathing a plot of land measuring 8B-1K-9 L in favour of the petitioner, Abdul Mozid Sk. Said Monser Ali Sk had died on 06-07-2000 leaving behind the petitioner two other sons Nur Hussain Sk. O.P.No. 1 and Abdul Motleb Sk, O.P No.2 . Monser Ali Sk. had executed the Will on 8-8-1996 No.III (33) in favour of the petitioner. The petitioner had been appointed executor in the said Will. The Will dated 8-8-96 is the last will and testament of the deceased Monser Ali Sk. Thus this prayer for issue of the probate in respect of the Will.

2. O.P. No.1 and OP No.2 in their written statement had inter alia denied the contention raised by the petitioner. According to answering O.Ps. the suit is not maintainable in law and facts and there is no cause of action for the present petition. According to answering O.Ps the petitioner has no possession over the land that the testator had intended to bequeath to the petitioner through the Will. According to answering Ops Monser Ali Sk, their deceased father had never executed any Will in favour of the petitioner to their knowledge and the petitioner is trying to grab the scheduled land by getting probate issued in respect of a Will which the petitioner got executed fraudulently. Thus the present petition for probate is liable to be dismissed.

3. Upon the above pleadings following issues had been framed:

- (1) Whether the case is maintainable in present form?
- (2) Whether the deceased Monser Ali Sk executed a Will in favour of Abdul Mozid Sk?
- (3) Whether the Will executed by the deceased Monser Ali Sk. in favour of Abdul Mazid Sk. is a genuine Will and same is last and final Will of deceased Monser Ali?
- (4) Whether the petitioner is entitled to get the probate of the Will in question issued?

4. Now before going to the evidence on record, it is necessary that the law applicable i.e. Section 270 of Indian Succession Act, 1925 is required to be looked into. Section 270- Probate of the Will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, movable or immovable, within the jurisdiction of the Judge. Thus section 270 makes it clear that when the petition for probate of the will or letters of administration becomes contentious it takes the form of a regular suit u/s.295 of the Act and the petitioner becomes the petitioner, the O.P. defendant.

5. Now issue No.1 with regard to maintainability of the petition has not been disputed by answering OPs and this issue is accordingly decided in favour of petitioner.

6. Issue No.2, 3 and 4 – These three issues are taken up together since all these three issues aim at the same objective that is to find out the genuineness of the will, whether the Monser Ali Sk. had executed a Will in favour of Abdul Mozid Sk, in sound disposing mind and finally whether it was the last Will or testament of deceased Monser Ali Sk, the testator.

7. Both petitioner and defendants admitted Monser Ali Sk. being their father, who had died on 6-07-2000. Ext-2 is the death certificate of Monser Ali Sk. which is on the record and is also not disputed. Now coming to the execution of Will by deceased Monser Ali Sk, the PW-1 Abdul Mozid Sk. in his affidavit under order 18 Rule-4 of CPC stated to being the sole petitioner seeking probate of the Will, ext-1, that according to PW-1 had been executed on 8-8-1996 No. being III (33) for land measuring 8B-1K-9L located at village Gutipara. PW-1 had further deposed that ext-1, Will was executed in favour of the PW-1 by his father in sound mental disposition, having put his thumb impression in presence of

witnesses, Samser Ali Sk, Sawkat Ali and himself. His father had died on 6-7-2000. PW-1 denied that the answering OPS had any share in the land bequeathed to him through ext-1, Will.

In his cross-examination PW-1 stated about his father Monser Ali Sk. leaving behind around 40 to 45 bighas of land on his death. According to PW-1 through ext-1 Will his father had bequeathed 8B-1K-9 L located at village Gutipara to him. He denied the suggestion that taking advantage of the advance age of his father, he got the ext-1, Will executed fraudulently. The defendants are his brothers and he denied the suggestion that his father had only 12 to 13 Bighas of land and out of the land that had been bequeathed to him 2 bighas of land is in the possession of defendants.

8. PW-2 is Samser Ali Sk. one of the witnesses to the execution of the ext-1, Will had said that Monser Ali Sk. was the father of the petitioner and OPs and the Will was executed in the year 1996 by Monser Ali Sk. in favour of his son Abdul Mozid and through ext-1, Will 8B-1K-9L located at village Gutipara Pt-II had been bequeathed to Abdul Mozid Sk. According to PW-2, Monser Ali Sk. was in good health and sound disposition of mind at the time the will was executed and registered at Sub-Registrar Office, Bilasipara. Monser Ali Sk had willingly in sound health and mind had executed the Will in their presence. After Monser Ali Sk. had put his thumb impression and on his request PW-2 had signed the Will as witness along with Sawkat Ali. Ext-1 (1) is his signature on ext-1, Will.

In his cross-examination PW-2 expressed ignorance with regard to total land area owned by Monser Ali Sk. and he also denied knowledge with regard to recorded patta holders in respect of the scheduled land.

9. DW-1 Nur Hussain Sk. in his evidence had contended that the petitioner got the ext-1, Will executed by his father by misleading him. According to DW-1, the petitioner has no possession over the land mentioned in the schedule of the Will since DW-1 has been in possession

of entire schedule land. The schedule –A land measuring 2 bighas is under the joint possession of petitioner and DW-1 and the stands in the name of his father. Further, DW-1 contended that his deceased father had total land area measuring 9B-3K-15L as per the report of the ASO, Bogoribari that had been called in Misc. Case No.59/ 11-12 and DW-1 further contended in his evidence that are Muslim can execute a Will with regard to only 1/3 of his total land in favour of any one and as such the petitioner got the Will, ext-1 executed violating the regulation as per Muslim land.

In his cross-examination DW-1 had stated that his father had land at Gutipara Part-II and Part-III. His father had 30 Bighas of land at those two locations. His father did not have any land at Gutipara Part-V. He denied the suggestion that his father had 5 bighas of land at Gutipara Part-V and expressed ignorance about his father owning additional 5 bighas of land at Jantuchara Pt-I. DW-1 admitted to enjoying right, title and possession over 8 bighas of his own land. His father had gifted him additional another $1\frac{3}{4}$ bighas of land in his favour. DW-1 also admitted knowing Samser Ali Sk. the witness in the case. He denied the suggestion that his father had owned around 45 bighas of land at Gutipara Pt-II, Pt-III, Pt-IV, Pt-V and Jantuchar Pt-I.

10. Now so far the factors to be considered in the issue of Probate in respect of a Will is concerned, though contentious, is nevertheless confined to the capacity of the testator, whether he was in sound and disposing state of mind when he made the will and whether the Will was the last Will and testament of the testator.

11. In this decision of our Supreme Court in Iswardeo Narain V Kamta Prosad AIR 1954 SC 280, the law on the point has been laid down in clear terms. It has been held that the probate Court is to see whether the will in question was the last will and testament of the deceased and if so whether it was duly executed and attested, and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is beyond the purview of the

probate court. Similarly it is also not the duty of the probate Court to consider any question of title to the property included in the will or the disposing power of the testator.

12 Now in the present case, ext-1, Will, as it appears from its content and in the light of the evidence of PW-1 and PW-2 above is the last Will and testament of deceased Monser Ali Sk. Further, the fact that PW-1 is the executor and that deceased Monser Ali Sk. had executed the ext-1, Will in sound disposing mind has been proved by PW-2, Samser Ali Sk. who is one of the attesting witnesses of the Will, ext-1. PW-2 had said that Monser Ali had put his thumb impression in his presence and the Will was registered at the Sub-Registrar Office, Bilasipara.

13. Thus I do not find any legal impediment with regard to execution of ext-1, Will, proved by one of the attesting witnesses, who had seen the testator putting his thumb impression on the Will in sound disposing mind. Since the contention of the answering OPs in their W.S. with regard to petitioner not being entitled to the land that had been bequeathed through ext-1 is a question of title same cannot be looked into while issuing probate of Will, ext-1.

14. Accordingly the Probate is granted in favour of petitioner, Abdul Mozid Sk who is according to ext-1, Will is the executor of the will. Probate be issued on the payment of required court fee on the value of land that had been bequeathed by the testator to the petitioner. Thus these three issues are decided in favour of the petitioner. The probate suit is disposed of on contest without any cost.

Given under my hand and seal of the Court on this 28th day of November, 2016.

Dictated & Corrected by me

District Judge, Dhubri

District Judge, Dhubri.