GAHC010202132016

2026:GAU-AS:9268

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

Case No. : Intest.Cas./2/2016

SRI SHIBU THAKUR
S/O LATE JOTAI THAKUR, R/O BARPETA ROAD TOWN, WARD NO. 2, P.O. BARPETA ROAD,MOUZA GOBARDHANA, DIST. BARPETA, ASSAM.

VERSUS

KANTI DEVI
W/O SRI PREM THAKUR

2.1:ON THE DEATH OF DILIP THAKUR
HIS LEGAL REPRESENTATIVES/HEIRS REEMA THAKUR
W/O LATE DILIP THAKUR

2.2:SUBHAM THAKUR
S/O LATE DILIP THAKUR

2.3:DEV THAKUR
S/O LATE DILIP THAKUR

RESPONDENT No. 2.2 AND 2.3 & MINOR
REPRESENTED BY THEIR MOTHER
RESPONDENT No. 2.1.

ALL ARE RESIDENT OF BARPETA TOWN
WARD NO.2
P.O BARPETA ROAD
MOUZA - GOBARDHANA
DISTRICT - BARPETA
ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

For the Appellant : Mr. N. Haque, Advocate

For the Respondents : Mr. S. K. Ghosh, Advocate

Date of Hearing : **07.04.2026**
Date of Judgment : **22.06.2026**

JUDGMENT

1. Heard Mr. N. Haque, learned counsel for the appellant. Also heard Mr. S. K. Ghosh, the learned counsel for the respondents.

2. This appeal under Section 299 of the Indian Succession Act, 1925, has been preferred against the judgment and order dated 4/8/2015, passed by the Court of learned District Judge, Barpeta in Title Suit (P) No. 1/2012, whereby the probate in respect of Will executed by late Jotai Thakur was granted in favour of the respondents.

3. The facts relevant for consideration of the instant appeal, in brief, are that the present respondents along with one Ganesh Thakur, approached the Court of learned District Judge Barpeta, by filing an application under Section 276 of the Indian Succession Act, 1925 for grant of probate of the will executed by late Jotai Thakur, who had expired on 4/5/2010. It was contended by the respondents before the Probate Court that the deceased Jotai Thakur executed his last will bequeathing a plot of land measuring 2 kathas, 10 lechas out of total land of 3 bighas, 4 kathas 6 lechas, covered by Dag No. 539 under Periodic

Patta number 400 of Village-Barpeta Road Town, at Ward No. 2, Mouza-Gobardhana the district of Barpeta, in favour of the present respondents and the Ganesh Thakur. It was also contended that the last will executed by the deceased Jotai Thakur was also registered before the Office of Sub-Registrar, Sarbhog. It is pertinent to mention herein that at the time of filing of the application under Section 276 of the Indian Succession Act before the Probate Court, the original will was not submitted along with the petition, and it was mentioned in the application itself that since the original will, i.e. Will No. 296/2010 dated 17/04/2010, was lying in the Office of Sub-Registrar, Sarbhog at the time of filing of the aforesaid petition, same could not be annexed along with the probate application.

4. After receipt of the notice, Shibu Thakur (present appellant) and Prem Thakur filed a written objection taking general defence like belated filing of the application under Section 276 after more than 2 years of the execution of the said will and certain other general defences. The opposite parties also contended that they being Class 1 heirs of the deceased Jotai Thakur, cannot be debarred from inheriting the properties left by Jotai Thakur after his death. On the basis of Pleadings of both the parties, the Probate Court framed following issues:

> *i) Whether there is any cause of action for this case, instituted by the petitioners for grant of probate of will?*
>
> *ii) Whether the petitioners can be the executors of the purported will by excluding the opposite parties who are the class-1 heirs of deceased being his sons?*
>
> *iii) Whether the petitioners are entitled to get probate of will as prayed for?*

5. In support of their respective cases, the petitioners (present

respondents) adduced evidence of 6 (six) witnesses, whereas, the opposite parties (appellant) adduced evidence of only 1 (one) DW. Both the parties exhibited certain documents as documentary evidence. However, ultimately, by judgment and order dated 4th August 2015, passed in Title Suit (Probate) No. 1/2012, the Court of learned Additional District Judge (FTC), Barpeta, granted probate of the Will of late Jotai Thakur in favor of the present respondents, namely Smti Kanti Devi and Dilip Thakur only, since, during the pendency of the Probate case, the other petitioner namely, Ganesh Thakur had expired. The aforesaid judgment and order passed by the Probate Court has been impugned in this appeal.

6. Mr. N. Haque, the learned counsel for the appellant has submitted that the trial court erred in granting the probate in favor of the respondents without taking into consideration that even the original Will was not exhibited by the respondents before the Probate Court during the probate proceeding. He submits that it is only the certified copy of the will, which was exhibited as Exhibit-2 in the probate case. He also submits that before exhibiting the certified copy of the will, the respondents have failed to satisfy the Court that the circumstances mentioned in Section 65 of the Indian Evidence Act, existed to justify adducing of secondary evidence (in the form of certified copy of the will) by the respondents. He submits that unless the respondents were able to show that the Provisions of Section 65 of the Indian Evidence Act were complied with, they could not have been permitted to adduce secondary evidence in the probate proceeding and the Probate Court erred in relying on the secondary evidence without the original Will being exhibited in the aforesaid proceeding. In support of his submission, the learned counsel for the appellant has cited a ruling of the Apex Court in the case of "***H. Siddiqui (dead) by Lrs. –vs- A.***

Ramalingam" reported in "***2011 (4) SCC 240".***

7. The learned counsel for the appellant has also submitted that in filing the application under Section 276 of the Indian Succession Act, 1925 by the respondents there has been non-compliance of the provision of Section 281 of the Indian Succession Act, *inasmuch as*, the Probate application was not verified by any of the attesting witness to the willas required by the aforesaid statutory provision. He submits that since the provisions contained in Section 281 of the Indian Succession Act, 1925 is mandatory in nature, any violation of same could not have been ignored by the trial court, and thus the trial court had erred in granting the probate in favor of the respondents by overlooking the violation of a mandatory requirement as contained in Section 281 of the said Act.

8. He further submits that As per Section 63(c) of the Indian Succession Act, 1925, it is mandatorily required that the Will has to be attested by at least 2 attesting witnesses, who have seen the testator signing or affixing his signatures to the will and such signatures have to be put on the will in presence of the executor by the such witnesses. However, he submits that the attesting witness examined by the respondents as PWs (more specifically PW-3 and PW-4) have deposed that they have only seen the deceased Jotai Thakur executing the purported Will.

9. He also submits that the attestation of the Will could not be proved within the meaning of Section 63(c) of the Indian Succession Act, 1925 or Section 3 of the Transfer of Properties Act, 1882, by the respondents and the trial court had erred in granting Probate to the present respondents. In support of his submission, he has cited following rulings:

(i) "***Kashibai –vs- Parwatibai"*** reported in"***(1995) 6 SCC 213"***

(ii)"***Lalitaben Jayantilal Popat -Vs- Pragnaben Jamnadas Kataria & Ors.***" reported in "***2008 (15) SCC 365***"

(iii)"***Nagulapati Lakshmamma –Vs- Mupparaju Subbaiah***" reported in "***AIR 1998 SC 2904***".

10. The learned counsel for the appellant further submits that the will was executed on 16/4/2010 and same was registered on 17/4/2010 and thereafter, within 17 days, i.e. on 4/5/2010, the testator died. He submits the non-compliance of the statutory requirements by the respondents in filing their application under Section 276 of Indian Succession Act creates suspicion and serious doubt regarding the genuineness of the will which the respondents have failed to remove by adducing reliable witnesses. As such, he submits that the impugned judgment of the Probate Court, may be set aside and this appeal may be allowed.

11. On the other hand, Mr. S. K. Ghosh, the learned counsel for the respondents submits that there is no illegality or infirmity in the impugned judgment and the trial court correctly granted the probate in respect of the last will of the deceased, Jotai Thakur in favor of the present respondents after considering materials on record as well as evidence adduced by the present respondents in the said proceedings.

12. He submits that as at the time of filing of the Probate Application under Section 276 of the Indian Succession Act before the Court of learned District Judge, Barpeta, the original Will was not in possession of the present respondents, asthe same was at that point of time still lying in the office of the Sub-Registrar, Sarbhog, hence, the same could not be submitted at the time of filing the probate case. He further submits that the mention about the said fact

has been made in the Probate Application filed by the present respondent. He further submits that at the time of adducing of evidence by the witnesses of the petitioner (present respondents) before the Probate Court, since the original Will was not in possession of the present respondents, they could not exhibit the said will, and instead, they produced a certified copy of the will dated 17-4-2010 which was exhibited before the Trial Court. He submits that the respondents have later on filed a petition before the Trial Court bearing Petition No. 319/2015, praying for allowing the present respondents to submit the original Will before the court and the said application was allowed by the probate court by its order dated 29/04/2015.

13. The learned counsel for the respondents has submitted that the said order was passed by the Probate Court under Section 267 of the Indian Succession Act, 1925 which empowers the District Judge to order production of original testamentary papers. He also submits that the Will, which was registered on 17/4/2010, was attested by four attesting witnesses, out of whom, two attesting witnesses, namely Sanjay Shah Sonar was examined by the Trial Court on 31/7/2013, whereas, another attesting witness namely Nikunja Das was examined as PW-3 on 11/7/2013. He submits that both the attesting witnesses have categorically deposed before the trial court that they have seen execution of the aforesaid will by the deceased Jotai Thakur, apart from the aforesaid witnesses, one other attesting witness Ram Niwas Mishra was also examined by the respondent as PW-4.

14. He further submits that the 4th attesting witness, namely Shankar Prasad Shah, also deposed that he has seen the deceased Jotai Thakur executing the aforesaid Will. He also submits that the attesting witness not only deposed regarding execution of the will by deceased Jotai Thakur, but they have

also deposed that they have seen other attesting witnesses putting their signatures on the saidWill.

15. The learned counsel for the respondents further submits that the procedural requirement of verification by at least one witness to Will, as provided under Section 281 of the Indian Succession Act, is not mandatory and same may be regarded as a directory provision, more so, when the attesting witnesses have been examined by the respondents as petitioner's witnesses before the Probate Court.

16. The learned counsel for the respondents also submits that the present appellant never raised any objection regarding non-compliance of the requirement of Section 281 of the Indian Succession Act before the Trial Court in their written objection. Hence, they are stopped from taking the said objection at this appellate stage. He further submits that the appellant never raised any doubt regarding genuineness of the Will before the Probate Court. They only prayed for not granting the probate mainly on the ground that the appellant being Class-I heir of the deceased, Jotai Thakur, cannot be deprived of their ancestral property.

17. He further submits that the prime duty of the Probate Court is to ascertain the genuineness of the Will, of which probate is sought for. However, the present appellant neither in their written objection nor while adducing evidence by the present respondents, before the trial court, have raised any such objection. Nor they have adduced any evidence suspecting genuineness of the aforesaid Will. He, therefore, submits that the appeal filed by the present appellant lacks merit and same may be dismissed.

18. I have considered the submissions made by the counsel for both sides

and have gone through the materials available on record. I have also gone through the rulings cited by the learned counsel for the appellant in support of his submission.

19. Following points are required to be determined in this appeal:-

A. *Whether the Probate Court was right in granting probate without the probate application being verified by one of the attesting witnesses as required under Section 281 of the Indian Succession Act, 1925.*

B. Whether the probate court was right in accepting the probate application without same being annexed along with the original copy of the will and accepting the certified copy of the will without the petitioner satisfying the requirement of Section 65 of the Indian Evidence Act.

C. Whether the Probate Court was right in coming to the finding that the execution of the will and attestation thereof by the independent witnesses have been duly proved.

D. Whether the Probate Court was right in granting the probate of the will which was registered on 17.04.2010.

20. As regards the compliance of Section 281 of the Indian Succession Act, 1925 is concerned a Co-ordinate Bench of this Court in the case of "***Bikash Chandra Prodhani Vs.On the death of Bhupesh Prodhani His legal heir Swapna Prodhani"*** reported in "***2025 0 Supreme (Gau) 601***" has held that the said provisions are directory in nature. This Court is in agreement with the observation made by the Co-ordinate Bench of this Court. More so, when the present appellant have not raised the objection as regards the non-compliance of the provisions contained in Section 281 of the aforesaid Act in their written statement. Further, as the petitioner (respondents) have adduced evidence of all

the four attesting witnesses in the probate proceedings, non-compliance of the provisions contained in Section 281 of the Indian Succession Act, 1925 would not vitiate the proceedings and same shall have to regarded as directory in nature.

21. As regards the second point for determination is concerned, i.e., whether the Probate Court was right in accepting the probate application without the original will annexed with the same, the scheme of Indian Succession Act, 1925, in Chapter-II of Part- IX of this aforesaid Act, provides for certain circumstances in Sections 237 to 240 of the aforesaid Act, where even a copy of the will may be presented along with the application till the original is produced before the Court. Under the provisions contained in Sections 237 to 240 of the Indian Succession Act, 1925 probate may be granted even on the copy of the original will till the original is produced before the court. The reason for non-production of the original will before the Court at the timing of filing of the probate application has been mentioned in the probate petition itself, i.e., the original will bearing No. 296/2010 dated 17.04.2010 was with the Office of Sub-Registrar, Sarbhog and same was not delivered to the petitioner at the time of the filing of the probate case.Hence, the original will could not be annexed along with the probate application. The circumstances shown by the petitioner for not filing the original will along with the probate application are acceptable and the trial court did no wrong in accepting the certified copy of the original will under the facts and circumstances of the case. It also appears from the records of Title Suit No.1/2012 that on 29.04.2015 the respondents submitted the original will before the Court and the said fact was reflected in the order dated 29.04.2015.

22. Though, under certain circumstances as provided in Chapter-II of Part-

IX of the Indian Succession Act, 1925, an application for grant of probate may be filed even without producing the original copy of the will. However, if the said copy (*it may be a certified copy*) is sought to be proved as documentary evidence, there remains no dispute that same being secondary evidence, the requirement of Section 65 of the Indian Evidence Act has to be followed before any such evidence may be admitted.

23. In this regards, the observations made by the Supreme Court of India in the case of "***H. Siddiqui (Dead) by Lrs. Vs. A. Ramalingam"*** reported in "***(2011) 4 SCC 240***" are relevant: -

> "***12.*** *The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] , State of Rajasthan v. Khemraj [(2000) 9 SCC 241 : AIR 2000 SC 1759] , LIC v. Ram Pal Singh Bisen [(2010) 4 SCC 491 : (2010) 1 SCC (L&S) 1072 : (2010) 2 SCC (Civ) 191] and M. Chandra v. M. Thangamuthu [(2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907] .)"*

24. In the instant case, the respondents have not adduced any evidence before the Probate Court as to why the original will could not be produced before it at the time of examination of witnesses. Further, after the original will was produced by the petitioner before the Probate Court, no leave was sought or nothing was done by the respondents to bring the same on record by exhibiting it

and confronting it to the witnesses. Even same was not confronted to the attesting witnesses to prove their signatures on the original will. Same was required as the certified copy of the will which was exhibited as Exhibit-2 did not bear the signature in original of the attesting witnesses. The documentary evidence is required to be proved in accordance with law. Mere admission of a document in evidence and marking the same as Exhibit does not amount to proof thereof. The court has an obligation to decide the question of admissibility of a document in secondary evidence before acting on the said document.

25. In the instant case, though the certified copy of the will was exhibited as Exhibit-2, however, the circumstances which necessitated the production of certified copy as secondary evidence was not brought on record in evidence by any of the witnesses. Moreover, though the original will was also produced before the Probate Court, however, it was merely submitted along with an application and it was not exhibited by any of the witnesses neither it was confronted to any of the witnesses. As such, the signature appearing in the will as well as the will itself cannot be said to have been proved. The second point for determination is accordingly decided.

26. As regards the third point for determination is concerned, Section 63 of the Indian Succession Act, 1925 provides as follows:-

> "***63. Execution of unprivileged Wills.—***
>
> *Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—*
>
> *(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
>
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
>
> *(c)The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator,*

or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

27. On perusal of the aforesaid provision, it appears that for proving the attestation of the will by two or more witnesses, it is required that evidence should indicate that each of the attesting witnesses has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator or has received from the testator a personal acknowledgement that his signature or mark or the signature of such other person.

28. In addition to above, it is also required tobe established by evidence that each of the attesting witnesses has signed the will in the presence of the testator, though it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

29. Similar is the meaning given to the phrase "attested" in relation to an instrument in Section 3 of the Transfer of Property Act, 1882, which provides as follows:-

"***3. Interpretation clause.—****In this Act, unless there is something repugnant in the subject or context,—*

……..

"*attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;*

30. From above, it appears that apart from proving that the attesting witness

has seen the testator signing or affixing his mark to the instrument what is further required is that each of the attesting witnesses has signed the will in presence of the testator.

31. In the instant case on perusal of the testimony of witnesses for the respondents' side, it appears that though there were four attesting witnesses to the will in question and though all the four attesting witnesses were examined as witnesses for the petitioners (present respondents), however, none of the witness has specifically deposed that they have signed on the will in presence of the testator. All of them have deposed that at the time of execution of the deed of will they were present. However, there is no evidence to suggest that at the time when they put their signature on the deed of will, it was done in presence of the testator, which is an essential ingredient for proving of the due attestation of a will by the attesting witnesses.

32. In the instant case, though four attesting witnesses were examined by the present respondents side before the probate Court, however, they fell short of giving evidence regarding due attestation of will inasmuch as they failed to depose that they have signed on the deed of will in presence of the testator. Since, the consequence of grant of probate of a will may, in some cases, result into deprivation of a due share to the natural heir of the testator, the probate has to be granted only upon satisfactory proving of the fact of attestation of the will as required by law and in this case, the respondents have failed to do so.

33. This Court is of considered opinion that the attesting witnesses have failed to satisfy due attestation of the will within the meaning of Section 65 (C) of the Indian Succession Act, 1925 read with Section 3 of the Transfer of Property Act, 1882.

34. In view of the discussions made and reasons stated in the foregoing paragraphs, the impugned judgment cannot be sustained. Accordingly, same is set aside.

35. The appeal is allowed.

36. However, in the facts and circumstances of this case, there shall be no orders as to cost, the parties shall bear their own costs.

37. Let the records of the trial court be sent back to the trial court along with a copy of this judgment.

JUDGE

Comparing Assistant