

IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY & INTESTATE JURISDICTION
ORIGINAL SIDE

Present :
THE HON'BLE JUSTICE ARINDAM MUKHERJEE

T.S NO.6 OF 2019

IN THE GOODS OF:

SISIR KUMAR BISWAS (Deceased) (Son of Late Sunil Kumar Biswas).

AND

IN THE MATTER OF:

SUPRIYO BISWAS (Son of Late Samir Kumar Biswas),
Executor appointed in the last Will and Testament of
the deceased.

..... Petitioner/Plaintiff

VS.

SWAPAN KUMAR BISWAS (Son of Late Sunil Kumar Biswas).

..... Defendant

For the Plaintiff : Ms. Debjani Ghosh
.....Advocate

Heard on : 19.12.2019, 17.01.2020 &
14.02.2020.

Judgment on : 21st October, 2020

Arindam Mukherjee, J:

- 1) An application for grant of probate of a Will dated 1st May, 2010 said to have been left behind by Sisir Kumar Biswas, the deceased as his last will and testament (hereinafter referred to as the said Will) was

made by one of the Executors appointed thereunder being the plaintiff above named. The said Will is in Bengali language. An official English translated copy of the same has also been produced.

- 2) The deceased was a bachelor and was a hindu till his death governed by the Dayabhaga School of hindu law. One of his brothers, namely, Swapan Kumar Biswas the defendant above named challenged the grant by filing a caveat. An affidavit in support of caveat was filed by the defendant at a belated state with the leave of the Court. The application for grant being PLA 239 of 2018 (In the Goods of: Sisir Kumar Biswas) was, therefore, set down as a contentious cause by an order dated 2nd April, 2019. The application was thereafter converted into a testamentary suit and was numbered as Testamentary suit No.6 of 2019 wherein the applicant/executor became the plaintiff and the caveator, the defendant.
- 3) The father and mother of the deceased had pre-deceased him. Sunil Kumar Biswas, the father died on 10th November, 1979 while Smt. Aloka Biswas, the mother died on 5th October, 2007. Their respective death certificates have been produced.
- 4) It is also the case of the executor that Samir Kumar Biswas and Smt. Shovana Sarkar, wife of Nirendra Nath Sarkar respectively one of the testators' brother and one of his sister pre-deceased him. Shovana Sarkar died on 25th November 2015 and Samir kumar Biswas did on 1st September, 1992. Their death certificates have been produced. Since the said brother and sister of the deceased

pre-deceased him none of them according to the executor were entitled to inherit the estate of the deceased.

- 5) The plaintiff has set out the details of the heirs in intestacy of the deceased in paragraph 4 of the application treated to be plaint after the application having been marked as a testamentary suit.
- 6) Sanjoy Biswas, Smt. Snigdha Das, Smt. Sabita Naskar and Smt. Suchitra Biswas amongst the heirs in-intestacy of the deceased have issued their respective no-objection in support of the grant by affirming affidavits before this Court all being dated 15th June, 2018 which are appended to the application, now the plaint.
- 7) The particulars of the estate of the deceased are set out in the Affidavit of Assets affirmed on 15th June, 2018. The gross value of such estate being of sum Rs.17,89,525.38.
- 8) Bibhas Bhattacharya, one of the attesting witnesses has said to have signed a declaration on 15th June, 2018 and forms part of the probate application.
- 9) The affidavit in support of the caveat was affirmed by Swapan Kumar Biswas on 12th February, 2019 and filed on 21st of February, 2019. The filing of the affidavit in support of caveat is recorded in an order dated 2nd April, 2019. By the said order the application for grant of probate was marked as a contentious cause and cross order for discovery of documents within two weeks from the said date with forthwith inspection was directed to the defendant failing which the defence of the defendant was to be struck off and the suit to be tried as an “Undefended Suit”. Records reveal that the advocate for the defendant duly received a copy of the said order dated 2nd April,

2019. Since the defendant did not comply with the directions given in the order dated 2nd April, 2019 the plaintiff took out an application under the provisions of Order 11 Rule 21 of Code of Civil Procedure, 1908. Even at this stage the defendant was afforded an opportunity to disclose documents and comply with the directions given in the order dated 2nd April, 2019. The defendant, however, remained unrepresented despite service. Therefore, on 19th, December, 2019 the defence of the defendant was struck off and the suit was directed to be proceeded in such form.

- 10) Considering the evidence, the documents exhibited and the materials on record I am of the opinion that the execution of the said Will has been duly proved. That apart and in any event no one challenged the said Will or contested the grant despite repeated opportunity upon due service and paper publication. This Will is apparently not tainted with any suspicious circumstances. There are no issues like undue influence, coercion or fraud being raised at the trial. The defence of the defendant though has been struck, yet this Court has considered the grounds canvassed by the defendant in the affidavit in support of caveat to satisfy its conscience since the role of the Court which exercising probate jurisdiction and ordinary civil jurisdiction are different. The Court has to satisfy its conscience before granting probate even if it remains unchallenged.
- 11) The defendant in his affidavit in support of his caveat has taken two points – the legal heirs of Shovana Sarkar, the deceased sister of the testator has not been made a party and that the signature of the deceased in the said Will is false, fabricated and forged one.

- 12) So far as the legal heirs of Shovana Sarkar are concerned, the said Shovana Sarkar died on 25th November, 2015 i.e. prior to the death of the testator. It is well settled that only the brothers and sisters of the deceased on the date of his death would have succeeded him in terms of section 8 read with the schedule for Class II heirs entry 3 and 4 and section II of the Hindu Succession Act, 1956 as the deceased was a male Hindu at the time of his death and governed by the Dayabhaga School of Hindu Law. Shovana Sarkar having produced the testator is not entitled to inherit the estate of the deceased as an heir in intestacy and a such her sons and daughters are also not entitled inherit. The said sons and daughters of Shovana Sarkar are also not entitled to citation.
- 13) In respect of the signature of the testator in the said Will is concerned the defendant has not come forward to either disclose any document or adduce evidence or cross-examine the plaintiff's witness despite receiving reasonable and sufficient opportunity. In absence of any effort from the side of the defendant to this effect the allegation as to the signature of the deceased in the said will that it is false, fabricated and forged one is not tenable. That apart and in any event the attesting witness has proved the signatures of the deceased in the said will. I am, therefore, not inclined to accept the defendant's plea in his affidavit in support of the caveat.
- 14) The Court fees paid as would appear from the certificate issued by the department of this Court is found to be sufficient.
- 15) This is a fit case for grant of probate. The petitioner Supriyo Biswas, son of Late Sisir Kumar Biswas, resident of 18, Rani Rashmoni

Road, P.S. New Market, Kolkata 700 013 being the executor to the said Will dated 1st May, 2010 is hereby granted the probate. The grant is with effect throughout the Union of India as prayed for and without any surety. The executor shall, within six months from date of issue of this grant to make a full and true inventory thereof and exhibit the same in this Court or within such further time as the Court may from time to time appoint and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint and within one year from the issue of this grant complete the distribution of the assets in accordance with the wish of the deceased as indicated in the said Will.

The suit is accordingly decreed. There shall be no order as to costs.

The department shall draw up the decree as expeditiously as possible.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)