

01.12.2022
Court No. 3
Sl. No. 1

CALCUTTA HIGH COURT
CIRCUIT BENCH AT
JALPAIGURI

C.O. 112 OF 2022

Smt. Alpana Ghosh & Ors.
Vs.
Smt. Debjani Lodh & Anr.

Mr. Bapi Sarkar

.....For the Petitioner

Mr. Bijay Bikram Das

.....For the Opposite Party

The instant application is filed under Article 227 of the Constitution of India praying for setting aside of the impugned Order No. 65 dated 29.06.2022 passed by the Civil Judge, Senior Division, Siliguri in Title (Partition) Suit No. 152 of 2022.

Nutshell of the case is that Title (Partition) Suit No. 152 of 2022 was filed by Opposite Parties against the present Petitioners in respect of two properties described in Schedule - A and B of the plaint. During pendency of the partition suit the present Petitioners who are Defendants of that suit discovered a registered will dated

24.09.1996 executed by Hasi Rani Ghosh since deceased in favour of the Petitioners/Defendants in terms of which the property mentioned in Schedule B plaint of the partition suit was bequeathed to the present Petitioners/Defendants. The present Petitioners filed an application under Section 151 of the Code of Civil Procedure praying for stay of the partition suit since an application was made for grant of letter of administration of the newly discovered will, in respect of the Schedule - B of the property of suit. The learned Trial Court dismissed the application in terms of the impugned Order against which the instant application under Article 227 of the Constitution of India is filed.

The learned lawyer for the Petitioner submitted that if the partition suit is not stayed rights of the parties will be prejudicially and adversely effected. He relied upon a Single Bench decision of this Court reported in case of **Mandira Das Vs. Kamdini Mondal reported in 2014 SCC OnLine Cal 5204**. However, the learned Counsel candidly admitted that Schedule

- A property is not included or subject matter of the probate proceeding.

Per contra, the learned Counsel appearing for the Opposite Parties vehemently opposed the idea that there should be stay of the partition suit particularly when the entire *corpus* of property is not subject matter of probate proceeding. According to him the partition suit may be proceeded with and final decree may be drawn subject to outcome of probate proceeding. The learned Counsel relied upon Single Bench decision of the Calcutta High Court reported in the matter of **Asoke Kumar Himmatsinghka Vs. Rajendra Kumar Himmatsinghka reported in 2005 (3) CHN 353; Ashalata Sikdar & Ors. Vs. Radha Binod Sikdar & Anr. reported in 2017 SCC OnLine Cal 18465; Smt. Menoka alias Mina Ghosh (Chowdhury) & Ors. Vs. Durga Shankar Ghosh & Ors..** The learned Counsel also relied upon the judgment of the Supreme Court during in **Binapani Kar Chowdhury Vs. Sri Satyabrata Basu & Anr. reported in (2006) 10 SCC 442.**

It is admitted position that only one of the properties which is subject matter of partition suit, is also subject matter of the probate proceeding. It is only Schedule - B property which is the subject matter of probate proceeding. The probate proceeding may continue for long in view of which there is no justification or reason to stay the entire partition suit. It is proper and apt if the Trial Court proceed with the partition suit. The Trial Court shall not draw up preliminary decree in respect of the property mentioned in Schedule – B which is also subject matter of the probate proceeding. But the Trial Court shall draw up preliminary and final decree in respect of the property mentioned in Schedule – A which is not subject matter of the probate proceeding.

In instant application under Article 227 stands disposed of.

(Sugato Majumdar, J.)