

June 28, 2023
Sl. No.08
Court No.19
s.biswas

CO 1170 of 2023

Sadhan Kumar Datta

vs.

Murari Mohan Borai and others

Mr. Shibaji Kumar Das

... for the petitioner

Mr. Amal Kr. Mukhopadhyay

Mr. Pinaki Bhattacharyya

Mr. Saikat Pal

... for the opposite party nos.1 & 2

The petitioner is one of the defendants in the Probate Suit No.37 of 2016, which is pending before the learned Additional District Judge, Fast Tract 2nd Court, Howrah. The petitioner is aggrieved by an order dated February 14, 2023, by which the petitioner's applications were rejected. A prayer for a direction upon the plaintiffs to exhaust further service of the summons upon the defendant Nos.7, 8, 13 and 21 and in the alternative to declare the suit to have abated against the said defendants, were rejected. Another prayer for adjournment of recording of evidence, was also rejected.

Mr. Das, learned advocate appearing for the petitioner vociferously urges that unless there was evidence that the defendant Nos.7, 8, 13 and 21 were served properly, the suit should not proceed, or else, before the court proceeds with the evidence, abatement of the suit in respect the heirs of Radha Rani Roy and Debjani Dutta, should be recorded.

Reference is made to the interrogatories. The question was whether the defendant Nos.7, 8, 13 and 21 were living or not, or whether they or any of them had expired. On this question, Mr. Das argued that the learned court could not have come to the finding that the issue of service of summons upon the said defendants had been answered in the form of interrogatories.

To this, Mr. Das refers to the answer given to the interrogatories, inasmuch as, that the plaintiffs were well-aware of the whereabouts of the defendants and as such the questions in the form of interrogatories were not maintainable. According to Mr. Das, the defendant Nos.7, 8, 13 and 21 could also be the beneficiaries of the testator and hence, in their absence the suit should not proceed.

Mr. Mukhopadhyay, learned advocate for the plaintiffs, has referred to various documents to show that attempts were made to serve the defendant Nos.7, 8, 13 and 21 in 2009. Another attempt was made in 2018, when an amended plaint was filed. On both occasions, the service return did not come back. Thereafter, the plaintiffs approached the court with an undertaking that they were willing to proceed with the suit at the risk of not having properly served the defendant Nos.7, 8, 13 and 21. Such prayer of the plaintiffs was allowed and the

learned court by an order No.33 dated September 16, 2022, directed as follows:-

“Order No.-33 dated 16.09.2022

Today is fixed for plaintiff to take steps.

Both sides are present before this Court.

Ld. Advocate for the petitioner submits that the Probate Case was filed in 2000. The steps has been taken time and again upon the O.Ps. But they did not appear to contest the suit. In such circumstances, the Ld. Advocate for the petitioner submits that the petitioner on his own risk wants to proceed with the suit so that he can get the result of the same and he prays for fixing the suit for evidence.

Heard the Ld. Advocate. Perused the record. Considering the submission of the Ld. Advocate and the fact that the case was initiated back in the year 2000, this Court is also of the opinion that when the petitioner is willing to take the responsibility of the consequences, the suit shall proceed expeditiously.

Hence, the issues are framed in a separate sheet of paper. Let it be kept with the record.

Fix 04.01.2023 for evidence.”

The learned court below while passing the order impugned, held that citations were made on two occasions and the provisions of Order 5 Rule 20 of the Code of Civil Procedure had been complied with, twice. The whereabouts of defendant Nos.7, 8, 13 and 21 were answered in the form of interrogatories

and the defendant No.1/petitioner failed to disclose the details of the defendant Nos.7, 8, 13 and 21.

Upon going through the order impugned, this court does not find any illegality, inasmuch as, the plaintiffs had undertaken to proceed with the suit at the risk of non-appearance of the defendant Nos.7, 8, 13 and 21. The petitioner, who is the defendant in the suit is to defend his own case and the consequence of the non-appearance of the defendant Nos.7, 8, 13 and 21 are not likely to affect his case. Moreover, it is very clear that in response to the citations, one in 2003 and the other in 2008, neither Radha Rani Roy nor Debjani Dutta entered appearance to contest the suit and file written statement.

Under such circumstances, the court does not find any illegality in the order impugned.

The revisional application is dismissed. The dismissal of this revisional application shall not prevail upon the learned court below in deciding the suit on merits. The learned court below should proceed independently.

(Shampa Sarkar, J.)