

Item No. 12
20.06.2023
Court. No. 19
GB

C.O. 1625 of 2023

Dr. Tarun Kumar Maiti

Vs.

Justice Dibyendu Bhusan Dutta (Retd.) & Anr.

*Mr. Aniruddha Chatterjee,
Mr. Abir Lal Chakraborty*

...for the Petitioner.

*Mr. Subhrojit Chakraborty,
Ms. Susmita Pal,
Ms. Moupiya Dey*

...for the Opposite Parties.

The revisional application has been filed challenging the orders dated March 18, 2016, December 17, 2016 and May 3, 2023 passed in O.S. Case No.27 of 2014 arising out of Misc. Judicial (Probate) Case No.42 of 2014 pending before the learned Additional District Judge, 3rd Court at Barasat, District – 24 Parganas (North). The probate case became contentious and O.S. Case No.27 of 2014, was registered.

The petitioner is the defendant in the suit. The opposite party nos.1 and 2 are joint executors of the Will of Late Sridhar Maiti.

By order no.19 dated March 18, 2016, the supplementary affidavit-in-chief of the P.W.1 was taken on record and the witness was examined in part. This is the first order under challenge in the revisional application. May 7, 2016 was fixed for further evidence of P.W. Such evidence continued. During the process of such evidence of the P.W.1 which continued after the supplementary affidavit-in-chief was taken on record, the petitioner filed an application dated

May 27, 2016 with a prayer for expunging the entire evidence of the P.W.1 recorded on June 29, 2015.

By an order dated December 17, 2016, the application dated May 27, 2016 was rejected with elaborate reasons. The said order attained finality. This is the second order under challenge in the application.

Thereafter, the petitioner filed three more applications, one for taking off the suit from the peremptory board, the other for expunging the contents of supplementary affidavit-in-chief and the third for recall of P.W.1.

By an order dated May 3, 2023, the learned court below rejected all the three applications filed by the petitioner. The ground shown was that the P.W.1 was fully examined, cross-examined and the evidence was concluded on March 15, 2021. Hence, the question of recalling the witness did not arise. The court further observed that the issue regarding marking of exhibits had already been decided by the predecessor of the learned court on July 13, 2018. The said order was not challenged before any superior forum and had attained finality. Thus, there was no reason to expunge the supplementary evidence-in-chief of P.W.1 when the cross-examination was allowed. Moreover, although an opportunity was given to the P.W.1 to adduce further evidence by recalling the witness when an amended written statement was filed by the petitioner, the P.W.1 did not adduce further evidence and did not recall any witness. Thus,

further recall of P.W.1 was not warranted. The applications were rejected.

Mr. Chatterjee, learned advocate appearing on behalf of the petitioner submits that once the evidence of the P.W.1 had been closed on October 17, 2015, further evidence by way of supplementary affidavit-in-chief could not be allowed by the learned court below. The application for expunging the said supplementary affidavit-in-chief, should have been allowed and the evidence should be expunged from the records. It is next submitted that the order dated December 17, 2016 was passed in respect of an application dated March 27, 2016 by which the prayer of the petitioner to expunge the evidence of P.W.1 dated June 29 of 2015 from the records, had been rejected. The said decision would not operate as a bar to reject the supplementary affidavit-in-chief as the said evidence was submitted subsequently and was not a part of the evidence of the P.W.1 dated June 29, 2015. The deposition in the supplementary affidavit-in-chief should be expunged on the ground that the new facts which were brought on record, were beyond pleadings in the suit. Finally it is submitted by Mr. Chatterjee that without a proper application under Order 18, Rule 17 of the Code of Civil Procedure to recall the witnesses, a supplementary affidavit-in-chief could not be accepted.

Mr. Chakraborty, learned advocate appears on behalf of the opposite parties and denies the contentions of Mr. Chatterjee. Mr. Chakraborty first submits that the applications filed by the defendant/petitioner were

vexatious, mala fide and only to stall the proceeding. The learned advocate submits that only when the petitioner filed an amended written statement, the learned court below by an order dated February 19, 2016 allowed the P.W.1 to file a supplementary affidavit-in-chief. Thereafter, evidence of the P.W.1 continued and the P.W.1 was extensively cross-examined on the contents of the supplementary affidavit-in-chief. It is further submitted that a second application for amendment of the written statement was filed by the petitioner. The same was initially rejected by the learned court below, but was allowed by the Hon'ble High Court. Recall and re-examination of PW1 was also permitted. However, the P.W.1 did not recall any witness.

Having gone through the contentions of the respective parties, this Court is of the view that the supplementary affidavit-in-chief was filed pursuant to a leave granted by the learned court below by order no.18 dated February 19, 2016. Thereafter, elaborate cross-examination had gone on for a long period. The evidence of P.W.1 was closed on March 15, 2021. The D.W. did not adduce evidence and the suit was fixed in the peremptory board. The question of expunging the supplementary affidavit-in-chief at this stage, would not arise as the evidence was allowed by court and cross-examination had been completed. The correctness of the deposition of the P.W.1 in the supplementary affidavit-in-chief and the plea of Mr. Chatterjee that facts which were not part of the pleadings were incorporated, are matters which will be decided at the trial. The petitioner was given ample

scope to cross-examine the P.W.1 on each and every contention in such supplementary affidavit-in-chief. Recalling P.W.1 is not necessary at this stage as the evidence was closed two years ago, upon affording adequate opportunity of cross-examination throughout. The learned court rightly held that the question of recall of witness did not arise. The only issue is whether the suit should be removed from the peremptory board and the DWs should be allowed to adduce evidence. The order impugned is modified to the extent that the suit shall be removed from the peremptory board and the DWs shall adduce evidence in accordance with law. The rest of the order impugned remains unchanged.

It is made clear that the learned court below shall fix a schedule with regard to the evidence of the DWs and the schedule will be strictly adhered to. Failure on the part of the DWs to comply with the direction of the learned court, shall entitle the learned court below to proceed with the suit in accordance with law. The suit is at a mature stage. It appears that a lot of time has been unnecessarily consumed, despite the closer of the evidence of P.W.1. The learned court below is directed to complete the evidence of DWs and proceed with the suit and dispose of the same within a period of six months from date of communication of this order. The probative value of the evidence or its relevance will be subject to trial and hence the contentions of Mr. Chatterjee, shall be decided at the final disposal of the suit.

Accordingly, the revisional application is disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)