

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

CO 1690 of 2023

Dr. Ruma Bhattacharya
vs.
Mrs. Sumita Banerjee & Ors.

For the petitioner : Mrs. Sohini Chakrabarty
Ms. Prajaaini Das

For the opposite party No.1 : Mr. Farhan Ghaffar,
Ms. Ananya Chatterjee

For the opposite party No.2 : Mr. Soumya Ray
Ms. Anwesha Saha

For the opposite party No.3 : Mr. Pritam Choudhury
Mr. Abhisek Addhya
Ms. Dipalakshmi Banerjee

Hearing concluded on: 26.06.2023
Judgment on: 01.08.2023

Shampa Sarkar, J.:-

1. The revisional application has been filed challenging an order dated April 18, 2023, passed by the learned Additional District Judge, 13th Court at Alipore, District: South 24 Parganas, in Original Suit No.- 39 of 2021.
2. By the order impugned, the learned court rejected an application filed by the plaintiff/petitioner, the propounder of the Will of late Dr. Parimal Banerji, seeking leave to appear as a witness at a later stage and for a

further direction to summon Santanu Ghosh, an attesting witness, to first depose and prove the Will.

3. It was submitted by the petitioner that a declaration by Santanu Ghosh was filed along with the application for probate. As the contesting defendants did not admit the case of the petitioner, the petitioner had the right to begin in terms of Order XVIII Rule 1 of the Code of Civil Procedure. As the declarant/attesting witness signed the declaration, at the request of the plaintiff/petitioner, upon understanding his duties and obligations, the said attesting witness should be summoned first, in order to adduce evidence and prove the Will. For the reasons stated hereinabove, such prayer was made. It was urged that such procedure would be in consonance with the provisions of Section 68 of Indian Evidence Act, 1872 and Section 63 of the Indian Succession Act, 1925.

4. The defendants opposed such application and submitted that as per law, the plaintiff should depose first and the evidence should proceed in terms of Order XVIII Rule 4 of the Code of Civil Procedure.

5. The learned Court, after contested hearing, rejected the claim of the petitioner on the ground that where a party wished to appear as a witness, he/she must appear before any other witness on his/her behalf, unless the court, was convinced that the party could be allowed to appear as his/her own witness, at a later stage.

6. The learned court held that the language of Order XVIII Rule 3A of the Code of Civil Procedure clearly provided that a party who wanted to appear as a witness in her own case, should adduce evidence first, unless there were compelling circumstances which would permit deviation from the said

rule. While allowing deviation from the said rule, the Court was also required to record cogent reasons.

7. In the case in hand, the learned Court below did not find any reason to summon the attesting witness Santanu Ghosh to adduce evidence in order to prove the Will, before the petitioner deposed as PW1.

8. Having considered the nature of the suit and the pleadings, this Court finds that the plaintiff claims to be the sole executor of the last Will and Testament of Dr. Parimal Banerji. The application for probate and the declaration was filed. As the suit was contested and there was no admission of the petitioner's case, the plaintiff had the right to begin. The plaintiff also wished to depose in respect of her own case.

9. Order XVIII Rule 2 of the Code of Civil Procedure, provides that the party having the right to begin must state her case and produce evidence in support of the issues which she has to prove. Order XVIII Rule 3A provides that where a party herself wishes to appear as a witness, she shall so appear before any other witness on her behalf is examined, unless the court for reasons to be recorded, permits her to appear as her own witness, at a later stage.

10. In this case, the defendants did not admit the case of the plaintiff. The plaintiff had the right to begin. As the plaintiff wished to be examined as a witness of her own case, in terms of Order XVIII Rule 3A CPC, the plaintiff should adduce evidence first and lay the foundation of her case. Although Ms. Chakrabarty relies on Section 68 of the Indian Evidence Act, 1872, in my view the said provision is not a deviation from the procedure laid down in the Code of Civil Procedure discussed above.

11. According to the provisions of Section 68 of the Evidence Act, the Will shall not be used as evidence, unless one of the attesting witnesses proves its execution. This does not mean that the law requires that the attesting witness should depose first, to prove the Will. Once, the plaintiff states her case, as propounder of the Will, the attesting witness can be called later to formally prove the Will.

12. A Will is required to be attested by attesting witnesses. Section 63 of the Indian Succession Act, 1925 states as follows:-

63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [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 acknowledgment of his signature or mark, or of 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.

13. Section 68 of the Evidence Act is quoted below-

68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act,

1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

14. A conjoint reading of the afore-mentioned two provisions of the law, do not either explicitly or impliedly mandate that the attesting witnesses must depose first in order to prove the execution of the Will, even before the plaintiff, who wishes to depose in support of her own case. Had the plaintiff decided not to depose, the situation would be otherwise.

15. In a similar situation, the Kerala High Court in the matter of **N.C. Kaladharan vs Kamaleswaran and others** reported in **AIR 2000 Ker 354**, the Kerala High Court held as follows:-

“6. The discretion available with the Court in the matter is not unbridled. It is a judicial discretion. Valid and compelling reasons must be made out for postponing the examination of parties until the witnesses are examined. What exactly prevents the party from going to the box first is a matter to be established by him and only when there is justifiable inability on the part of the party to get himself examined first, the question of postponing his examination will arise.”

7. One of the material questions that the Court has to address in the matter is whether postponement of the examination is sought with ulterior motives and whether it would result in filling up the lacunae that might be left out in the evidence of the witnesses. Whether he is wantonly avoiding the box is also a question that has to be answered. Unless compelling circumstance exists the permission for postponing such examination cannot be granted. This is so because Order 18 Rule 3(A) of the C.P.C. aforementioned was introduced through an amendment in 1976 based on a report of the Law Commission stating that the normal and healthy practice to be followed by the trial Court is to call upon the parties to the suit before their witnesses are examined. Resort to a contrary practice would lead to undesirable practices bordering on dishonesty and that is why Rule 3A of the C.P.C. was introduced through amendment making it obligatory on the part of the trial Court to lay down reasons for deviating from the normal practice.

8. The above conclusions find considerable support from a decision of this Court in *Sadasivan v. Dinakaran*(1988)1 Ker 20 also. It was found therein that though the Court has the discretion to allow a party to appear as a witness at a later stage, the imperative mandate is that a party shall always be examined before his witnesses are examined.

This is subject to the discretion of the Court in appropriate cases to reverse the order.

9. In the instant case, the petitioner has no case that he is prevented by any sufficient cause from going to the Box to open case. His contention is only that under Secs. 67 and 68 of the Evidence Act the will of which he has to speak about requires formal evidence and that only when the will is properly proved, he can lead evidence. If he is examined first, it would not be possible for him or for the Court to use the will as evidence in the course of his examination and that is the reason projected for justifying his request for examination. I do not find any merit in the said contention. Even though the will can be proved only through formal evidence as required by Secs. 67 and 68 there is nothing which prevents the petitioner from speaking about the will and in referring to the contents of the will. A will can always be marked subject to formal proof. It cannot be said that unless and until the will is proved the party will not be able to refer to the contents thereof in his evidence, of course, the will has to be made available in Court and this can be done by issuing summons to the District Registrar to produce it before the Court. There will not be a bar for issuing such summons in the first instance.”

16. The matter went up to the Hon’ble Apex Court. The Hon’ble Apex Court in the matter of ***N.C. Kaladharan vs. Kamaleshwaran and ors.*** reported in **(2002) 10 SCC 184**, held as follows:-

“3. The main question which is addressed to this Court against the impugned order is, whether the High Court was right to insist on the examination of the appellant first before the examination of the witnesses to formally prove the will. The High Court relying on the provisions of Order 18 Rule 3-A CPC observed that normal and healthy practice which is adopted by the trial court is, to call upon the parties to the suit before their witnesses are examined. The High Court did not find any fault in such approach, hence rejected the case of the appellant. The contention for the appellant before the High Court was that Sections 67 and 68 of the Evidence Act, require formal proof of a will and only when the will is properly proved, he can lead his evidence, in case he is examined first it will not be possible for him or for the court to use the will as evidence in the course of his examination. This submission of the appellant was rejected by the High Court.

4. Learned counsel for the appellant has stated before us, which is also recorded earlier in our order dated 14-7-2000, that the appellant does not desire to appear as a witness in this suit. In view of this, the very question of the priority of his examination first loses its credence. In view of this, the Court may proceed to examine the evidence in terms of Sections 67 and 68 of the Evidence Act. Hence no question of

insisting upon the appellant to be examined first arises now. With these observations and modification of the impugned order, the appeal stands disposed of. Costs on the parties.”

Thus, the Hon’ble Apex Court disposed of the appeal, interalia, holding that the question of priority of examination would lose credence as the appellant did not wish to depose at all.

17. In the decision of ***Marappa Gounder and ors. vs. Sellappa Gounder & ors.*** reported in ***AIR 1985 Mad 183***, the Madras High Court held as follows:-

“5. When the rule contemplates permission to be granted by Court for a party to a proceeding to be examined at a later stage, it is indicative that there is no total ban against parties being examined after their witnesses are put in the witness box. That was why, in the decisions above referred to, it was held, that the rule is directory in nature. This would not mean that the rule could be transgressed indiscriminately in an unbridled manner. A duty is cast on the court to record reasons, which means that valid and compulsive grounds must be made out, for postponing the examination of parties to the suit. If a party to the suit desires to be examined later on, he should seek prior permission before the other witnesses are examined. In its absence, it can be sought later on at the time when the party put in the witness box, if by mischance any of his witnesses have been; already examined, without securing earlier permission. Whenever permission is sought for, it is obligatory on the part of Court to record reasons, by passing a written order, either granting or refusing it. If permission, is sought in the initial stage before any witness; is examined, then reasons to be given should relate to the justifiable inability on the part of the party to first examine himself. Before granting permission, it should hear the objections, if any, of the other side, and then alone permit any witness of the party to be examined.

6. In such of those cases wherein without, prior permission witnesses of the party had been examined, and later on the party wishes to appear as a witness, the Court is duty bound to find out, whether on

the party being examined at that stage, it would result in filling up any blanks or lacunae left out in the evidence already given, and whether wantonly he avoided the witness box with ulterior motives, and whether he was placed in such a situation or circumstances which had disabled him from being examined earlier, etc. Unless compelling strong circumstances which are relevant and germane had existed, permission to a party to a proceeding to examine himself after his witnesses had been examined, ought not to be granted. The intention of Parliament in enacting the rule, which had come into existence, on the recommendation made by Law Commission, had resulted in a revised procedure being evolved, according to which a court has to record reasons mentioning the circumstances which it takes into consideration for granting permission. Failure to give valid reasons, would vitiate the order and the evidence recorded without permission, cannot be treated as part of the records in the suit. The most desirable and the healthy practice required to be followed by trial Courts is to call upon parties to the suit, as soon as the suit is posted for trial, to file memos into Court stating as to whether they intend to be examined or not. If only trial Courts resort to this practice, it would result in proper compliance with R. 3-A and the notorious malpractice indulged in would come to an end. A suitable amendment in the Civil Rules of Practice to this effect, would bring about uniformity of procedure in the trial courts in this State.”

18. In this case, the exceptional situation for leave to depose later and to summon Santanu Ghosh to depose first, has not been established by the petitioner. There is no averment either with regard to the inability of the petitioner to take the box first, or the compelling circumstances requiring the attesting witness to depose first. Filing of a declaration with signature of Santanu Ghosh, cannot be a cogent reason to allow Santanu Ghosh to depose first. The learned Court rightly rejected the application by refusing to exercise discretion in the matter. Neither any cogent reason for such grant

of leave nor any justifiable ground to call the attesting witness was found by the learned Court below, in order to make a deviation from the general rule.

19. This court does not find any illegality or material irregularity in the order impugned.

20. Under such circumstances, the revisional application is dismissed.

21. There will be no order as to costs.

22. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)