

15.05.2023
SL No.22
Court No.8
(gc)

**FMA 367 of 2021
CAN 2 of 2021**

**Swapan Kumar Roy
Vs.
Sulochona Singh & Anr.**

Ms. Shila Sarkar,
Mr. Sibasis Ghosh,
...for the Appellant.

In spite of service, the respondents are not represented, nor any accommodation is prayed for on behalf of the respondents.

The appeal was formally admitted on 21st January, 2021. At the time of admission of the appeal, the Coordinate Bench, inter alia, passed the following order:-

“Admittedly the application for probate is pending and if the estate is allowed to be dissipated it would tantamount to an encumbrance on the estate and we find no reason that the right of the heirs in case of an intestacy has primacy over the right of an executor, more particularly, in view of the provisions of Section 211 of the Indian Succession Act, 1925. We find that a prima facie case is made out.

The aforesaid respondents are restrained from transferring, alienating and/or encumbering the property comprised in the estate of the deceased as disclosed in the application filed in the trial Court except L.R. Plot no.1538 measuring 0.03 satak recorded in L.R. Khatian No.675 in Mouza – Domohini, P.S. – Barabani, District – Purba Burdwan, for a period of eight weeks from date or until further order, whichever is earlier.

It is open to the aforesaid respondents to pray for variation, vacation and/or setting aside of this order after the service of the copy of the application for injunction filed in the instant appeal.”

In spite of notice, the respondents did not appear to contest the said proceeding. We have been informed that the probate proceeding is still pending. Ms. Shila Sarkar, learned Advocate represent the appellant submits that the provision of Order 39 Rule 1 is applicable to probate proceeding and the Court has the power to injunct the parties and the executor from dealing with the properties during the pendency of the proceeding and in this regard she has relied upon the Division Bench judgment of the Calcutta High Court in ***Atula Bala Dasi & Ors. Vs. Nirupama Devi & Anr. being Civil Rule No.2101 of 1950, decided on 27.02.1951 (MANU/WB/0112/1951)***. In the said decision, in Paragraph 9, the law has been discussed for the purpose of brevity, the said paragraph is reproduced below:-

“9. The relevant question in this connection, therefore, will be whether the property which was going to be sold in the present case in the execution proceedings pending before the learned Subordinate Judge was the property which was the subject-matter of the will for which an application for the grant of letters of administration had been made. On this point, there is a dispute between the parties as to what is contained in the will which is not pending before the learned Dist. J. The proceedings before the learned Dist. J. have now become contentious.

Persons who have any interest in the grant of the probate are entitled to appear in these proceedings, & that is what has already taken place. The D. Hs. Who had put the decree into execution against Amal are certainly persons who are interest in the proceedings before the probate court, specially in view of the fact that the petitioners for the grant of letters of administration claim that the property which is about to be sold is the property which has been disposed of by the testator Saradindu not in favour of his son Amal, but in favour of others. It is not for the probate court while granting the letters of administration to interpret the will for the purpose of deciding the question of title, but if an application for the appointment of an administrator pendente lite is made, the Court will have to be satisfied prima facie that the will contains provisions which affect the properties which are now the subject-matter of the execution proceedings. For this limited purpose only the court is entitled to look into the will, & then proceed to decide whether this is a fit case for the appointment of an administrator pendente lite.”

Under such circumstances, we do not find any reason not to continue the interim order and dispose of the appeal by directing the interim order to continue till the disposal of the suit.

The appeal stands allowed.

The order dated 21st January, 2021 is confirmed.

We request the learned Additional District Judge, 1st Court, Asansol to dispose of the probate proceeding being O.S. No.02 of 2012 as expeditiously as possible and preferably within a period of one year from the date of

communication of this order without granting any adjournment to either of the parties.

It is needless to mention that the learned Trial Judge shall decide the matter uninfluenced by the observation made in this order.

Accordingly, the appeal and the application stand disposed of.

Since the respondents/opposite parties are not represented, a copy of this order may be sent to them by the learned Advocate-on-record for the appellant for information and record.

(Uday Kumar, J.)

(Soumen Sen, J.)