

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 3771 of 2022

Sri Om Prakash Bajoria & anr.
Vs.
Sri Sonaram Das

For the petitioners : Mr. Siddhartha Lahiri,
Mr. Debraj Dutta.

Hearing concluded on: 26.09.2023

Judgment on: 10.10.2023

Shampa Sarkar, J.:-

1. This revisional application arises out of an order dated November 7, 2022 passed in Title Suit No.1314 of 2018 by the learned Civil Judge (Junior Division) 2nd Court at Sealdah.
2. By the order impugned, the learned Court below allowed an application under Order 22 Rule 3 of the Code of Civil Procedure filed by one Sonaram Das dated August 2, 2019. Sonaram Das is the opposite party. Upon the death of the original plaintiff, the opposite party was substituted by the order impugned, as a legal representative of the deceased/plaintiff Arabinda Das. The court held that the right to sue devolved upon the opposite party on the basis of a registered Will.
3. The case of the opposite party was that the deceased/plaintiff Arabinda Das, executed his last Will and Testament and appointed him as

the Executor of the Will. Arabinda Das, further bequeathed upon him, the suit property mentioned in the schedule of the plaint. The right to sue devolved upon the opposite party as the Executor of the Will of the deceased/plaintiff.

4. The defendant/petitioner filed a written objection and submitted that the suit property was a thika property and the learned Court did not have any jurisdiction to try the suit. The defendant/petitioner also stated that the opposite party did not file any application for grant of probate of the Will of Arabinda Bose. The defendant denied the execution of the Will in respect of the suit property. The property bequeathed under the Will was separate and distinct of the suit property.

5. Upon a careful perusal of the Will, the learned court found that the Will was a registered one and executed in favour of the opposite party. The Will recorded that the deceased/plaintiff along with his brothers and sisters had got the property on the basis of a partition decree. Upon death of all sisters and brothers, the deceased/plaintiff alone, became the absolute owner of the property. During his lifetime, the deceased (plaintiff in the suit), out of his own free will executed the said Will and bequeathed the property in favour of the opposite party. Although, the opposite party did not file any application for grant of probate, the learned Court held that the law did not require the Executor of the Will to obtain probate in order to represent the estate of the deceased in a suit or legal proceeding.

6. The petitioner/defendant has challenged the said order. Learned Advocate for the petitioner submitted that the suit was in respect of schedule-A property and schedule-B property. Both schedule A and B

property were part of premises No. 226B, Bagmari Road created out of the original premises No.226, Bagmari Road. Premises No.226, Bagmari Road measured about 9 bighas 12 cottah 11 chittaks 34 sq. ft. together with houses, sheds, structures, etc. Subsequently, premises No. 226, Bagmari Road was renumbered as 226A and 226B, Bagmari Road, Kolkata – 700054. Thereafter, the said property was recorded as premises No.B/226A/H/15, Bagmari Road. Out of the said 9 bighas 12 cottahs 11 chittaks 34 sq. ft, only 30 cottahs of land had been bequeathed to the opposite party by the deceased plaintiff along with house, sheds, structures, etc. The schedule of the property mentioned in the Will was butted and bounded by the acid factory of the petitioner in the north. Thus, the property in occupation of the petitioner did not fall within the schedule of the Will. The Will did not cover the entire 9 bighas 12 cottah 11 chittaks 34 sq. ft. of the land, in question. The opposite party who was the beneficiary with regard to only 30 cottahs of land, could not be substituted in place of the deceased. The right of the opposite party was only in respect of the schedule of the property as mentioned in the Will, but not with regard to the portion either in occupation of the petitioner or any other person.

7. Mr. Larhiri, learned Advocate for the petitioner submitted that the intention of the testator was to bequeath only the specified demarcated portion of the schedule of the property in the Will to the opposite party. Thus, the opposite party did not have any claim with regard to the part of the property which was not covered by the schedule of Will. The suit was filed for eviction/recovery of khas possession in respect of schedule-A property and not in respect of the schedule of the property mentioned in the

Will. The decree for permanent injunction restraining the defendant from making any illegal construction addition or alteration by encroaching the land was prayed for in schedule-B property.

8. The description of the schedule-A and B property in the suit were clear and distinct and separate from the schedule of the Will. Thus, the learned Court below erred in allowing the application for substitution filed by the opposite party. In the written objection filed by the petitioner, it was stated as follows:-

“The Schedule A of the plaint as has been filed by the Late Arobinda Bose referred to all that one room/shed (measuring 36’ X 50’ more or less), having brick-built walls and tile roof, situated at and being portion of Premises No. 226B, Bagmari Road, (formed out of original premises No. 226 Bagmari Road), under Police Station – Manicktala, Kolkata – 700 054, under Ward No.14 of the K.M.C. in the District of 24-Parganas (South), and Schedule B referred to all that vacant open space, situated on the adjacent southern side of the Schedule – ‘A’ property, lying at Premises No. 226B, Bagmari Road (formed out of original premises No.226, Bagmari Road), under Ward No.14 of the K.M.C. in the District of 24-Parganas (South). Therefore the schedule in the plaint and the schedule as mentioned in the Will are completely different. Incidentally the land area in the schedule of the purported Will and Testament dated 22.03.2018 referred to 30 Cottahs of land and lying and situate at Premises No.226A, Bagmari Road and the boundaries thereto has been indicated to be “butted and bounded as follows:-

‘On the north by: Acid Factory Jagadish Chandra Agarwal (Bajoria);’ Thus it is evidence by a conjoint reading of the schedule of the plaint and the schedule of the purported Will and Testament dated 22.03.2018 by Late Arabida Bose, That Arabinda Bose did not bequeath Schedule A property of the plaint to the said Sonaram Das whereas in the plaint as filed by Late Arabinda Bose, he had claimed to have purportedly given the Schedule A property by way of an oral license to Late Jagadish Prasad Agarwala @ Bajoria.”

9. It was further contended that the property in question, in respect of which the petitioner was in occupation was a thika property and the suit was not maintainable.

10. Having heard the learned Advocate for the petitioner, it appears that the suit for eviction and recovery of khas possession had been filed in respect of one room/shed situated over a portion of premises No.226B, Bagmari Road and vacant open space situated adjacent to the southern side of the schedule-A property, more fully described as schedule-B property in the suit. The schedule of the plaint is quoted below:-

“The Schedule 'A' Property (suit property):

All That one Room/shed (measuring 36' x 50' more or less), having brick-built walls and tile roof), situated at and being portion of Premises No.226B, Bagmari Road, (formed out of original Premises No.226, Bagmari Road), under Police station- Manicktala, Kolkata-700 054, under ward No. 14 of the K.M.C. in the District of 24-Parganas (south).

Butted and bounded as follows :-

On the North by : Property of plaintiff and thereafter gali passage;

On the south by : Open Vacant space belongs to the plaintiff.

On the East by: shed of satya Narayan Jadav.

On the west by: Bagmari Road.

The schedule- 'B' Property:

All That Vacant open space, situated on the adjacent southern side of the schedule - 'A' property, lying at Premises No.226B. Bagmari Road (formed out of original Premises No.226, Bagmari Road), under police station- Manicktala, Kolkata-700 054, under ward No. 14 of the K.M.C. in the District of 24- Parganas (south).”

11. The schedule of the Will consist of all that piece and parcel of land measuring around 30 cottahs more or less together with sheds, structures, houses, etc. (under occupation of different occupiers/tenant/trespassers) out of the total land measuring around 9 bighas 12 cottahs 11 chittaks 34 sq. ft. known as premises No.B/226A/H/15, Bagmari Road.

12. From the recital of the Will, it appears that the premises was originally renumbered as 226A and 226B Bagmari Road thereafter the premises was recorded as premises No.B/226A/H/15, Bagmari Road. The opposite party

is the executor and also a beneficiary the Will. The schedule of the Will is set out herein below for convenience:-

“ALL THAT piece and parcel of land, measuring 30 (thirty) Cottahs more or less, together with sheds, structures, houses etc. (under occupation of different occupiers/tenant/trespassers), out of the total land, mentioned in the ‘First Schedule’ hereinabove written, situate and lying at Premises No.226A, Bagmari Road, presently known as Premises No.B/226A/H/15, Bagmari Road, under Police Station – Manicktala, Post Office – Kankurgachi, Kolkata – 700 054, District – 24 Parganas (South), together with all rights, benefits, easement rights, including the right over the common passages, roads, etc. and also together with other rights thereto.

Butted and bounded as follows:-

ON THE NORTH BY: Acid Facory Jagadish Chandra Agarwal (Bajoria);

ON THE SOUTH BY: Tara Chemical Factory of Bobindra Chandra Paul;

ON THE EAST BY: Property of Narayan Ch. Das;

ON THE WEST BY: Factory of Usha Chaturbedi.”

13. Although, upon comparison of the schedule of the suit property and Will may appear to be different, there is no dispute with the fact that the opposite party was also appointed as the Executor of the last Will and Testament of the deceased. The relevant paragraph of the said Will is quoted below:-

“I, therefore, execute this WILL and desire that after my death, my said beloved person SRI SONARAM DAS, son of Late Badal Chandra Das, residing at B/226A/H/15, Bagmari Road, under Police Station – Manicktala, Kolkata – 700 054 shall get in absolute right over the said property, as described in the ‘SCHEDULE’ hereunder written, absolutely freely and forever and he will hold, process and enjoy the said property as sole owner thereof and the said Sri Sonaram Das will record his name in the Assessment Register of the Kolkata Municipal Corporation as sole owner and will pay all taxes and will acquire full ownership right over the said property, as has been described in the ‘Schedule’ below.

I direct that after my death, no one shall have any right, claim or demand over the said property or any portion thereof and if anyone raises any objection against this WILL, that shall have no force and the same shall not be entertained in any Court of Law.

This is my Last Will and it shall come in force after my death and I do hereby nominate, constitute and appoint the said SRI SONARAM Das,

Son of Late Badal Chandra Das, by faith – Hindu, by Occupation – Business, by Nationality – Indian, residing at B/226A/H/15, Bagmari Road, under P.S. Maniktala, Kolkata 700 054, as the ‘EXECUTOR’ of my WILL and after my death, my said Executor will obtain Probate of my Last WILL and after my death, my said Executor will obtain Probate of my Last WILL from a Competent Court of Law, without furnishing any security. No one shall have right to raise any objection towards granting of Probate of this WILL and if there is any objection the same shall not be entertained before any Court of Law.”

14. From the recital of the Will it appears that the opposite party was residing at premises No. B/226A/H/15, Bagmari Road and the testator wanted to donate the demarcated portion in the schedule to the opposite party out of love and affection and he was satisfied with the care, love affection and respect that was shown to the deceased by the opposite party. The opposite party was also appointed as the Executor of the Will. The Executor has the right to act on behalf of the estate of the deceased, initiate legal proceeding and represent the estate of the deceased even before probate is granted. An administrator or beneficiary cannot represent the estate unless probate or letters of administration is granted. On the other hand, an Executor represents the estate of the testator, irrespective of the testamentary disposition. The Executor’s interest in the estate of the deceased, vests on him immediately upon the death of the testator. An Executor is the legal representative of the deceased for all practical purposes. Only based on the schedule of the plaint and that of the Will, it would not be proper for this Court to come to a conclusion that the properties were distinct and separate. The premises number is B/226/H/15, Bagmari Road. The schedule-B of the suit is a vacant open space. Both the properties bare the same premises number. The onus is on

the opposite party (substituted Executor) to prove that he could maintain the suit for eviction and the reliefs prayed for could be granted to him. These are matters of evidence. Whether the property in the schedule of the plaint and the schedule of the Will were same or distinct cannot be decided without trial. Such issues will be adjudicated at the time of trial.

15. Under such circumstances, the learned trial court had not erred in law in passing the order impugned.

16. No interference is called for. The revisional application is dismissed. The petitioner is at liberty to raise all points at the trial. This order shall not preclude the learned Court below from deciding the pending demurrer application and other applications, in accordance with law and on their own merits.

17. There shall be no order as to costs.

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

(SHAMPA SARKAR, J.)