

6.1.2023
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Ct. no. 652
sb

C.O. 4597 of 2016

**Dulal Banerjee
Vs.
Kaushik Chakraborty & Anr.**

Mr. Gopal Chandra Ghosh ...for the petitioner

Opposite party is not represented.

This revisional application has been preferred against the order no. 62 dated 3.11.2016 passed by the learned Additional District Judge, 2nd Court, Barasat in O.S. no. 23 of 2000.

The petitioner contended that the opposite party no. 1 herein as sole executor made an application before the District Delegate at Barasat for Probate of a purported Will dated 12.1.1988 alleged to have been executed by Parul Bala Banerjee, since deceased. The probate proceeding became contentious after objection filed by the petitioner and was transferred to the 3rd Court of learned Additional District Judge at Barasat being renumbered as Probate Case no. 23 of 2000. The said Probate proceeding was dismissed on 17.7.2006. Thereafter, in the year 2008, the said opposite party no. 1 filed a Miscellaneous case under Order IX Rule 9 which was registered as Miscellaneous case no. 14 of 2008 and together with said application, the opposite party no. 1 also filed an

application under Section 5 of the Limitation Act and said proceeding was restored accordingly.

The petitioner further submits in this connection, that the testatrix of said purported will namely Parul Bala Devi is the mother of the petitioner. The opposite party no. 2 herein is the petitioner's sister and opposite party no. 1 is the son of the opposite party no. 2.

In fact, said Parul Bala Devi executed her last will on 6.6.1997, whereby she bequeathed her properties in favour of her son, namely the petitioner herein. Accordingly, the petitioner herein as sole executor applied for probate of the said last will dated 6.6.1997 which was registered as Probate case no. 111 of 2002. The said probate proceeding also became contentious upon objection raised by the opposite party no. 2 herein and the same was also transferred to the learned Additional District Judge, 2nd Court, Barasat and renumbered as O.S. 17 of 2005. After recording evidence and hearing argument for both the parties, learned court below fixed the matter for deliver of judgment on 17.9.2011 in aforesaid O.S. 17 of 2005 but unfortunately instead of delivery of judgment, the said learned court observed that another probate case i.e. aforesaid O.S. 23 of 2000 being pending regarding another will executed by the same person in favour of opposite party no. 1 involving the same properties, the said probate proceeding needs to be

heard analogously with the petitioner's probate proceeding i.e. O.S. 17 of 2005.

A Revisional application was filed challenging the said order by the petitioner and this court in C.O. 3943 of 2011 directed the said learned court for disposal of said probate proceeding i.e. O.S. 17 of 2005 at an early date after setting aside the order proposing analogous hearing and also directed to proceed with other probate proceeding being O.S. 23 of 2000 by following law and procedure.

In the said O.S. 23 of 2000, trial has started. The PW1 and PW 2 have been cross examined and discharged. Thereafter one Yunus Ali Khan, the scribe of said will was examined on 5.2.2016 as PW-3 and some documents were exhibited and the petitioner's learned advocate cross examined him in part on the same day and the next date for further cross examination was fixed on 7.4.2016. Unfortunately in spite of readiness on the part of the petitioner to cross examine the PW-3, the learned court below adjourned the matter and the next date was fixed on 7.6.2016, on which date case adjourned at the instance of opposite party no. 1 and next date was fixed on 11.8.2016. On that day, the petitioner filed Hazira and appeared before the learned court below at 10.30 A.M. but learned court did not sit and upon enquiry, he came to know that court will sit a bit later. Accordingly, learned advocate for the petitioner herein left

the court in order to attend hearing before another court. it is alleged that thereafter the court sat and the matter was called and as learned advocate for the petitioner herein could not appear, the court below was pleased to close the cross-examination of PW-3 and discharged the said witness and fixed the next date for examination of defence witnesses (DW). The petitioner herein thereafter filed an application under order XVIII, Rule 17 of the code praying for recalling of PW-3 for further cross-examination by the defendant/petitioner herein but learned court below rejected defendant/petitioner's said prayer for recalling PW-3 under order XVIII, rule 17 on the ground that defendant was not diligent enough to cross-examine PW-3, by the order impugned.

The petitioner contended that learned court below has acted illegally and material irregularity in exercising his jurisdiction by rejecting the application under Order XVIII Rule 17 of the Code of Civil Procedure without appreciating the circumstances under which the petitioner's advocate could not attend to cross examine of PW-3.

Learned court below also failed to assign any cogent reason for rejection of the petitioner's application for recalling and came to a erroneous finding that sufficient opportunity has been granted to the defendant to cross examine PW-3.

Having considered the facts and circumstances of the case and for the interest of justice and to adjudicate real controversy between the parties effectively and conclusively, C.O. 4597 of 2016 is disposed of with a direction upon the learned court below to give one more opportunity to the opposite party/defendant to cross examine PW3 within a period of one month from the date of the communication of the order and to make every endeavour to conclude the evidence in the said proceeding preferably within a period of three months thereafter.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)