

ORDER SHEET

TS/9/2018

IN THE HIGH COURT AT CALCUTTA
Testamentary & Intestate Jurisdiction
ORIGINAL SIDE

IN THE GOODS OF :
REKHA DATTA (DEC)
-AND-
RAM KUMAR MAHATO
-VS-
DIBYENDU SEN

BEFORE:

The Hon'ble JUSTICE KRISHNA RAO

Date : December 12, 2023

Appearance :

Mrs. Arpita Saha, Adv.

Ms. Sinthia Bala, Adv.

... for the plaintiff

Mr. Debmalya Ghosal, Adv.

Mr. Arnab Dutt, Adv.

Mr. Jit Ray, Adv.

... for the defendant

The Court: Mrs. Arpita Saha, learned counsel, is appearing for the plaintiff and Mr. Debmalya Ghosal, learned counsel, is appearing for the defendant.

Learned Counsel for the plaintiff prays for time for taking appropriate steps for recalling of the order dated 4th October, 2023 wherein this Court has closed the evidence of the plaintiff.

Counsel for the defendant has raised objection and brought notice of this Court to the several orders passed by this Court from 20th February, 2020 but the plaintiff fails to bring the witness to complete the examination-in-chief and cross-examination.

It is found from the record that the examination in chief of the plaintiff's witness was started on 20th February, 2020 but subsequently the examination in chief of the plaintiff's witness was deferred and since then due to Covid-19 pandemic, the witness could not be examined. After Covid-19 pandemic, the matter was listed on 11th November, 2022 and this Court had fixed the matter on 19th December, 2022 for evidence. On 19th December, 2022, the plaintiff had prayed for time and accordingly the case was adjourned till 24th January, 2023. In the order dated 19th December, 2022 it was categorically mentioned that if the plaintiff fails to bring the witness, the case of the plaintiff will be closed. On 24th January, 2023, none appeared on behalf of the plaintiff but the Counsel for the defendant was present and accordingly this Court has closed the evidence of the plaintiff and fixed the matter for evidence of the defendant's witness on 20th February, 2023 at 3:45 p.m.

On 20th February, 2023 the plaintiff has filed an application being GA/3/2023 for recalling of the order dated 24th January, 2023 and for allowing the plaintiff to adduce the evidence. By an order dated 14th August, 2023, this Court has allowed the application filed by the plaintiff and the plaintiff was directed to examine the witness on 4th October, 2023 and 5th October, 2023 subject to payment of costs of Rs.10,000/- and further condition that on the said date the plaintiff will examine the witness in full, failing which the order dated 14th August, 2023 will be revived. On 4th October, 2023 when the matter was called, none appeared on behalf of the plaintiff and neither the plaintiff has

adduced evidence and accordingly, this Court has revived the order dated 14th August, 2023 and closed the evidence of the plaintiff and fixed the matter today. Today when the matter is called, counsel for the plaintiff prays for time.

This Court finds that on 14th October, 2023 this Court has closed the evidence on the side of the plaintiff but till date the plaintiff has not taken any steps and when the matter is called, counsel for the plaintiff has prayed for time.

Considered the submission made by the counsel for the respective parties.

This Court finds that this is not a fit case to grant time to the plaintiff as till date the plaintiff has not taken any steps for recalling of the order dated 14th August, 2023 and accordingly, the request made by the counsel for the plaintiff is rejected.

Counsel for the defendant submits that he will not adduce evidence and he will argue the matter on merit. Accordingly, the matter was heard on merit.

Counsel for the defendant submits that the plaintiff has initially filed an application for grant of probate and after receipt of caveat and affidavit in support of caveat, this Court has converted the case to the contentious cause and marked the case as TS 9 of 2018. The plaintiff has been given liberty to prove the Will and on 20th February, 2020, the plaintiff has examined the witness in part and thereafter, the

plaintiff failed to appear before this Court to conclude his examination in chief and till date the examination in chief is not completed.

Counsel for the defendant submits that as the examination in chief is not concluded and the defendant could not get an opportunity to cross-examine the plaintiff's witness, the evidence in part of the plaintiff could not be taken into consideration.

In support of his contention, learned counsel for the defendant has relied upon the judgment reported in **2002 SCC OnLine Cal 516 (Paritosh Ghosh vs. Ashim Kumar Gupta & Ors.)** and submitted that the plaintiff has not proved the Will in terms of Section 63 of the Indian Succession Act. Counsel for the defendant has also relied upon the judgment reported in **(2009) 4 Supreme Court Cases 780 (Yumnam Ongbi Tampha Ibema Devi vs. Yumnam Joykumar Singh and Others)** and submits that the plaintiff has not proved the Will as per Section 68 of the Indian Evidence Act.

Considered the submission made by the learned counsel for the defendant, perused the materials on record and orders passed by this Court from time to time.

The plaintiff has examined the witness in part on 20th February, 2020 and thereafter has not examined the witness in full even after several opportunities given to the plaintiff. The defendant could not get an opportunity to cross-examine the plaintiff and as such, the evidence led by the plaintiff cannot be taken into consideration and

accordingly, this Court finds that the plaintiff has failed to prove the Will and is not entitled to get probate as prayed for.

In view of the above, TS/9/2018 is dismissed.

(KRISHNA RAO, J.)

RS