

18.12.2024
Item No.
AD 8
Saswata

C.O. 636 of 2024

**Sarawati Barat
versus
Swapn Kumar Dutta & Ors.**

Mr. Sharanya Chatterjee
Mr. A. Ghosh

...For the petitioner

Mr. Bhaskar Roy

...For the opposite party nos. 1 and 2

Ms. Megha Chanda

...For the respondent no. 3

1. Challenging the order no. 13 dated 11th December 2023 passed in Title Suit no. 348 of 2022 by the Learned Civil Judge (Junior Division), Assansol dismissing the petitioner's application under Order VII Rule 11 of the Code of Civil Procedure (hereinafter referred to as the "Code"), the instant revisional application has been filed.

2. Briefly, the facts are that the instant suit has been instituted, inter alia, praying for a decree for declaration that the deed of sale dated 17th May 2022 executed by the defendant nos. 4 to 11 in favour of the defendant no. 12 is void and the same be delivered up and cancelled, as also for consequential relief.

3. The opposite party nos. 1 to 10 and the plaintiffs in the aforesaid suit are close relatives. The plaint case proceeds on the premise that late Dharmadas Dutta (the deceased) during lifetime who was a resident of Purba Bardhaman had made and published a will dated 23rd June 2014 which was registered before the Additional District Sub-Registrar, Kulti, Purba Bardhaman, wherein the property of the deceased as morefully described in the schedule of the plaint, was bequeathed to the plaintiffs as also the defendant nos. 1 to 3. The plaint case further proceeds on the premise that although, the defendant no. 1 had applied for grant of probate before the Learned District Delegate Asansol, which was registered as Probate Case no. 71 of 2019, the

defendant no. 1 subsequently did not inform the plaintiffs with regard to the development of the probate proceeding. Later in June 2022, the plaintiffs became aware that the defendant nos. 4 to 11 were in the process of transferring the suit property which had been bequeathed by the deceased in favour of the plaintiffs as also the defendant nos. 1 to 3.

4. Immediately, the plaintiffs had made searches and come to learn that the property had been transferred in favour of the defendant nos. 12 and the same had also been mutated in his favour. Challenging the aforesaid, the instant suit has been filed. The defendant no. 1 is contesting the suit by filing written statement. Subsequently, on or about 3rd January 2023, the aforesaid defendant had filed an application under Order VII Rule 11 of the Code, inter alia, praying for rejection of the plaint on the ground that the above suit cannot be proceeded since the plaintiff claims his interest in the suit property on the basis of an unprobated will and that the prior proceeding being LA case no. 326 of 2018 filed by the plaintiffs before the Court of Learned District Delegate, Assansol for grant of letters of administration had been dismissed for non prosecution. The plaintiffs contested the said application by filing written objection and ultimately by a judgment and order dated 11th December 2023, the Learned Judge was pleased to reject the said application.

5. Challenging the aforesaid the instant revisional application has been filed.

6. By an order dated 19th June 2024, a Coordinate Bench of this Court had admitted the instant revisional application and had stayed all further proceedings in the aforesaid suit till the month of September 2024. On 1st October 2024, since the opposite parties did not appear, a Coordinate Bench of this Court had extended the interim order. Today, the matter had come up under the heading "*for extension of interim order*". At the time of hearing, learned advocates appearing for the opposite parties

would submit that they had not been properly served with a copy of the instant revisional application as such could not appear before the Coordinate Bench, when the matter was taken up previously. Extension of interim order is opposed.

7. Without going into the issue as to whether the copy of the revisional application had been duly served, by consent of the parties hearing of the instant revisional application is taken up.

8. Mr. Chatterjee, learned advocate appearing for the defendant no. 1/petitioner submits that in this case, the plaintiffs/opposite parties had filed an application for grant of Letter of Administration. Such proceeding has been dismissed as withdrawn and it is thereafter that the instant suit has been filed. According to him, once, a proceeding for grant of Letter of Administration was withdrawn; a suit based on the bequest made in the will executed by the deceased cannot be proceeded since the cause of action for proceeding with such suit on the basis of the bequest no longer survives. It is submitted that this aspect has not been properly considered by the Learned Court. He further submits that since the probate is yet to be granted by a Court of competent jurisdiction, no suit could have been instituted by the plaintiffs/opposite parties on the strength of the last will and testament allegedly executed by the deceased. In support of such contention he has placed reliance on the provisions of Section 213 of the Indian Succession Act, 1925 (hereinafter referred to as the "said Act"). Having regard thereto he submits that this Court may set aside the order impugned and reject the plaint.

9. Mr. Roy, learned advocate appearing for the plaintiff/opposite party nos. 1 and 2 would submit that there is no impediment in filing a suit by claiming interest in respect of the will allegedly made and published by the deceased. The will is a registered will. The defendant no. 1/ petitioner had already filed an application for grant of probate which statement is recorded in

the plaint. Subsequently, behind the back of the opposite parties/plaintiffs, the property has been sold. Independent of the will, the opposite parties/plaintiffs as co-sharers of the property are otherwise entitled to the interest in the property on the basis of intestate succession, and the sale in favour of the third party is prima facie illegal. He submits that the Learned Judge has rightly rejected the application under Order 7 Rule 11 of the Code and no interference is called for by this Court.

10. Ms. Chanda, learned advocate enters appearance on behalf of the plaintiff/opposite party no. 3.

11. Having heard the learned advocates appearing for the respective parties, I find that in the instant case it would transpire that the opposite parties/plaintiffs claim interest in the suit property on the strength of the will allegedly made and published by the deceased. The opposite parties/plaintiffs as well as the defendant no.1/ petitioner, the defendant nos. 2 to 11 are related to each other and in case of intestate succession on the death of their father, the deceased, would be entitled to the estate of late Darmadas Dutta. The defendant No.4 is the widow of late Dharmadas Dutta. From the statements made in the plaint, it would appear that the opposite parties nos. 1 and 2/ plaintiffs had not only claimed interest as a beneficiary/legatee under the will made by their deceased father but the opposite parties/plaintiffs in paragraph 4 of the plaint have categorically indicated the names of the legal heirs of the deceased. The plaintiffs are Class-I legal heirs in case of intestate succession. It may be noted that by filing the suit the opposite parties/plaintiffs seek declaration that the sale deed executed by the defendant nos. 4 to 11 in favour of the defendant no. 12 in respect of the property which forms subject matter of the suit to be void and be delivered up and cancelled.

12. As to whether the provisions of Section 213 of the said Act impedes upon the rights of a party claiming under unprobated

will, to institute a suit is no longer *res integra*. I find that the Learned Judge had elaborately discussed the same by relying on the judgments delivered by the Hon'ble Supreme Court in the cases of ***Binapani Kar Chowdhury -vs- Satyabrata Basu*** reported in **(2006) 10 SCC 442** and ***Mrs. Hem Nolini Judah v Mrs. Isolyne Sarojbashini Bose*** reported in **AIR 1962 SC 1471**.

13. By placing reliance on the above judgments, the learned Court has come to a finding that when the rights of either an executor or a legatee under the will to represent the estate is in issue, the said right can only be established in a probate proceeding or letters of administration. However, Section 213 of the said Act does not interfere with the rights of such parties to institute a suit or action by claiming legatee through the will.

14. Having regard thereto, I have no hesitation to hold that simply because the plaintiffs/opposite parties have filed the suit without obtaining probate of the last will and testament published by the deceased, the same does not render the suit barred by law.

15. The only other point taken by Mr. Chatterjee is that by reasons of the factum of grant of letters of administration being withdrawn, the suit ought not to be proceeded and should be dismissed. On this score, I find that in an application under Order VII Rule 11 of the Code, it is the statement made in the plaint which is to be taken into consideration. Admittedly, there are no averments in the plaint that the probate proceeding has been withdrawn by the plaintiffs. I find that the aforesaid is a defence case and as such, the Learned Judge has rightly rejected the application of the defendant no.1/petitioner under Order VII Rule 11 of the Code.

16. Having regard thereto and since the defendant no. 1/petitioner could not identify any procedural irregularity or jurisdictional error committed by the Learned Judge, the instant revisional application fails.

17. The Civil Revisional application being CO 636 of 2024 is accordingly dismissed without any order as to costs.

18. All parties shall act on the basis of the server copy of this order duly downloaded from this Court's official website.

(*Raja Basu Chowdhury, J.*)