

12.06.2024
Item No.48, ML
Ct.19
A.J.

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION**

C.O. 746 of 2024

Kabita Dey nee Sen

-Vs-

Sri Samir Kumar Sen

Mr. Saunak Bhattacharya,
Mr. Bikash Kumar Singh,
Mr. Avirup Halder.
.....for the petitioner.

Mr. Asit Baran Raut,
Mr. Asit Kumar Chowdhury.
.....for the opposite party.

Affidavit of service filed on behalf of the
petitioner be kept with the record.

The father of the petitioner and the
opposite party Rabindra Nath Sen (since
deceased) was the named executor of the alleged
last Will and Testament of Annapurna Sen, the
paternal grandmother of the petitioner.

The said named executor applied for grant
of probate of the said Will which was registered
before the learned Chief Judge, City Civil Court at
Calcutta as Probate Case No.72 of 1992.

The executor died before the disposal of
the said Probate case, as such, at the instance of
the opposite party, the same was converted into
L.A. Case No.7 of 1993 which was allowed on
June 26, 1994 granting Letters of Administration.

The petitioner applied for revocation of the
said grant on the ground that she has a
caveatable interest but no citation was issued to
her.

The said application was registered as Misc. Case No. 7194 of 2008, it was dismissed by the learned Trial Judge but in an appeal being FMAT 244 of 2018, the Hon'ble Division Bench of this Court has allowed the same thereby revoked the said grant and directed the learned Trial Judge to decide the said Letters of Administration Case.

The opposite party thereafter in the said L.A. Case, on June 14, 2023 filed an affidavit stating that he would rely upon the evidence of the propounder Sudha Rani Dey and the attesting witness of the said Will together with all other materials of the said L.A. Case.

The petitioner, responding to the said affidavit, filed an application on June 26, 2023 praying permission of the learned Trial Judge to cross-examine the opposite party.

The learned Trial Judge, by the order impugned dated September 06, 2023 has dismissed the said application.

The petitioner had filed another application praying that the evidences adduced by the witness in the said L.A. case prior to revocation of the grant be expunged from the record.

The learned Trial Judge by the second Order impugned being order dated January 16, 2024 has also dismissed the said application.

Mr. Bhattacharyya, learned advocate for the petitioner submits that the opposite party is not entitled to rely on the evidences of the witnesses recorded in the proceeding prior to revocation of the grant as his client did not get any opportunity to cross-examine the said witnesses.

He further submits that the petitioner is entitled to cross-examine all the witnesses to be cited by the opposite party in support of his prayer for grant, as such, the learned Trial Judge is not justified in rejecting the prayer of the petitioner to cross-examine the opposite party.

Mr. Raut, learned advocate for the opposite party, on the other hand, submits that the Hon'ble Division Bench of this Court, while remanding the case, had directed the learned Trial Judge to re-hear the said L.A. Case from the stage where the petitioner ought to have been permitted to adduce evidence with regard to the due execution and validity of the Will as all of the attesting witnesses have died, the opposite party has to rely on the deposition of the said dead witnesses to prove the will.

Heard the learned advocate for the parties, perused the materials-on-record.

The learned Trial Judge in the order impugned dated September 06, 2023 relying on Section 33 of the Indian Evidence Act, 1872, has

held that the probative value of the evidences of two witnesses namely Sudha Rani Dey(P.W.1) and the attesting witness Kamal Bihari Sen shall be considered at the time of final disposal of the L.A. case, such finding is erroneous inasmuch as a Will since is required by the law to be attested, the execution of it is to be proved by the attesting witnesses. Section 33 of the said Act of 1872 covers completely a different situation.

The petitioner since did not get the opportunity to cross-examine the said P.W.1 or the attesting witness of the Will, their evidences cannot have any probative value for the purpose of proving the execution of the said Will.

The opposite party is required to prove the Will in accordance with law. The execution of the Will cannot be proved on the basis of the evidence of the attesting witnesses recorded prior to the revocation of the grant of the Letters of Administration on the ground that the said witnesses are dead, the opposite party, under such circumstances can take resort to the provision of Section 69 of the said Act of 1872.

The Hon'ble Division Bench in its judgment passed in the aforementioned appeal has permitted the petitioner to cross-examine the witnesses to be produced to prove the said L.A. Case. The witness action in the proceeding since

has not yet started, the prayer to cross-examine the opposite party has not yet matured.

The order impugned dated September 06, 2023, for the aforesaid reason, is set aside.

The prayer of the petitioner to expunge the evidences recorded prior to revocation of the grant of the Letters of Administration, being misconceived, the learned Trial Judge has rightly rejected the said prayer, the order impugned dated January 16, 2024 therefore does not call for any interference.

The proceeding is pending since 1993. The learned Trial Judge is requested to expedite the disposal of it.

C.O. 746 of 2024 is disposed of with the above observations without any order as to costs.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)