

27
sandip
Ct. 19
15.07.2024

*In The High Court At Calcutta
Civil Revisional Jurisdiction
(Appellate Side)*

C.O. No. 1398 of 2024

**Smt. Devayani Mitra Dutta & Anr.
Vs.
Sri Animesh Datta & Ors.**

Ms. Sohini Chakraborty,
Ms. Soumi Guha Thakurta,
Mr. Saikat Dey ... For the petitioners.

Mr. Arijit Dey ... For the O.P. No. 1.

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

Except the opposite party no. 1, other opposite parties are not
represented in spite of service.

The instant application under Article 227 of the Constitution of
India is directed against the Order dated March 11, 2024 passed
by the 15th Court of learned Additional District Judge, at Alipore,
District: 24 Parganas (South) being *Other Suit No. 86 of 2017*.

The opposite party no. 1 is the named Executor of alleged last
Will and Testament of one Amitava Datta.

The petitioner no. 1 is the widow and the petitioner no. 2 is the
daughter of the said Amitava Datta.

The connected suit for grant is proceeding *ex parte* against the
petitioners; they applied under Order IX Rule 7 of the Code of
Civil Procedure praying that they may be heard in answer to the
suit on the ground that they were not aware of the said proceeding
and in fact, no summons were served upon them.

The learned Trial Judge, by the order impugned, has dismissed
the said application holding that the proceeding has become
contentious at the instance of the defendant no.2 as she appeared
before the District Delegate and filed her Vakalatnama, besides,

summons were sent by Post at the correct address of the said defendants and the *Through-Court* summons were received by one Urmila Adhikary on behalf of the said defendants, therefore the defendants, in spite of having knowledge of the proceeding, did not appear.

Ms. Sohini Chakraborty, learned advocate for the petitioner submits that the summons sent through Registered Post had returned with the Postal endorsement “*Addressee not known*” which cannot be treated as a *Good Service*. She further submits that the Vakalatnama in the record was not executed by the defendant no.2 and her clients do not know of any lady namely the said Urmila Adhikary, therefore, the learned Trial Judge has erred in dismissing the application of the petitioners under Order IX Rule 7 of the Code. The petitioners want to contest the proceeding to prove that the said Amitava Datta had never executed the Will, as alleged.

Mr. Arijit Dey, learned advocate for the opposite party no.1 submits that a new case has been sought to be made out which was never made in the application under Order IX Rule 7 of the Code. The learned Trial Judge has categorically held that the summons was sent to the correct address of the defendants, which is sufficient to draw the presumption of *Good Service*. He submits that the impugned order does not call for any interference.

In response to the said submission, Ms. Chakraborty submits that the application was filed in haste; as a result, some vital points have been left out. She prays that an opportunity may be afforded to the petitioners to prove the non-service of summons.

Heard learned counsels for the parties, perused the materials on record.

The petitioners are denying that they had ever appeared in the probate proceeding, in particular the appearance of defendant no.2. They are also alleging that they do not know of any lady,

namely Urmila Adhikary, who had allegedly received the *Through-Court* summons on their behalf.

In view of the relationship of the petitioners with the executor, they should be given a chance to prove non-service of summons before disentiing them to contest the proceeding.

The order impugned is therefore set aside. The learned Trial Judge shall decide the application under Order IX Rule 7 of the Code afresh, in accordance with law, after giving opportunity to the parties to produce cogent evidence(s) to support their respective cases.

The learned Trial Judge is requested to dispose of the said application as expeditiously as possible, without granting any unnecessary adjournment to either of the parties.

C.O. 1398 of 2024 is thus disposed of without any order as to costs.

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

(Biswajit Basu, J.)