

February 8, 2024
Sl. No.5
Court No.19
s.biswas

CO 2421 of 2022

Shri Subhendu Dey

vs.

*Shri Sunil Kumar Dey (since deceased), represented by
Smt. Krishna Mallick and others*

Mr. Saumyen Datta

Mr. Aniket Mitra

... for the petitioner

1. Despite service, none appears on behalf of the opposite parties.

2. The order dated May 11, 2022, passed by the learned Additional district Judge, 13th Court, Alipore in O.S. No.5A of 2014, is under challenge before this court.

3. By the order impugned, the learned court rejected the application filed by the petitioner to summon the learned advocate through whom the written statement had been filed by one Sunil Kumar Dey (since deceased) in Title Suit No.17 of 1996. The purpose of calling Mr. Dipankar Bhanja, learned advocate as a witness, has been enumerated in the said application.

4. This is a suit for grant of letters of administration of the Will of Surja Kumar Dey, dated July 11, 1963, that is, the father of Sunil Kumar Dey. It is contended that the heirs of Sunil Kumar Dey have raised an objection with regard to genuineness of the Will, although the execution of the Will had been admitted in the written statement

filed by Sunil Kumar Dey in Title Suit No.17 of 1996, which was renumbered as Title Suit No.70 of 2019. The said suit is pending before the learned Civil Judge (Senior Division), 6th Court, Alipore. The defendant No. 1(b) Smt. Kajal Roy had adopted such written statement in the suit.

5. According to the petitioner, the certified copy of the written statement has been filed in court and Mr. Dipankar Bhanja, learned advocate, should be summoned to prove the said certified copy.

6. The learned court was of the view that by filing the application, the plaintiff had tried to prove the contents of the pleadings of a dead person. The learned advocate could not prove the contents of the said written statement. The contents could be proved by the maker and the signature could be proved by someone who was acquainted with the signature of the maker. There was no presumption of correctness of the document. The written statement was filed on November 6, 1998 and same was not 30 years old.

7. This court is of the view that the learned court did not err in passing the order impugned.

8. First and foremost, the application which was filed before the court was for a direction to call Mr. Dipankar Bhanja, learned advocate who allegedly drafted the written statement filed in the earlier suit, to prove the certified copy of the written statement.

Summoned witness cannot be called upon to prove the evidence sought to be relied upon by the plaintiff, i.e., the contents of the written statement filed in another suit. Although, it is argued that the only prayer was to summon Mr. Dipankar Bhanja to depose as to whether Sunil Kumar Dey signed the written statement in his presence or not, in my opinion, this would not be the proper process to prove the document. The court is right in concluding that the contents of the written statement or the certified copy of the written statement could not be proved by the learned advocate, who had drafted and filed the same in Title Suit No.17 of 1996. It is for the party who relies on such written statement to prove the same in terms of the provision of the Indian Evidence Act.

9. Considering the facts pleaded, this court now proceeds to address the factual aspect which had led to the filing of the application to summon the learned advocate. In the written statement filed by Sunil Kumar Dey, in Title Suit No.17 of 1996, it had been stated as follows:

“3. The suit is also not maintainable for partition of the said premises no.4/3, Dever Terrace (previously known as 4/3, Garcha 2nd Lane) as the same was bequeathed by Surya Kumar Dey, by his last will dt. 11.7.63, the owner of the property to his wife and to his four sons, the defendants 1 to 4 and to their male issues and in the absence of male issues to the wife of any of the predeceased sons. The plaintiff has no claim

in the said property and cannot seek partition thereof.

4. By his last will, Surya Kumar Dey, appointed this defendant and his mother, Lakhimani Dey, as executor and executrix, empowering them to take probate of the said will. They jointly made an application for probate in the court of the Id. District Delegate at Alipore being Act XXXIX Case No.27/1995 (Probate). In the said suit, the will was duly proved and a probate of the said will was granted, as there was consent to the grant of the probate even by the plaintiff. However, subsequently, the plaintiff denied to have granted consent and filed an application u/s 262 of the Indian Succession Act praying for revocation of the probate. The said application was registered as O.S. No.55/1994 of the court of the Id. District Judge at Alipore. Consent was granted to the revocation of the probate. The revocation case succeeded and the probate of the will granted by the Id. District Delegate, as aforesaid, was revoked by order no.6 dt. 19.4.95. Thereafter, application as made in the court of the Id. District Delegate for withdrawal of the application for probate for being filed in the form of a suit.”

10. It is shown before this court that by an application dated March 17, 2011, Smt. Kajal Roy had adopted the written statement of Sunil Kumar Dey in Title Suit No.17 of 1996. Such document is available with the records.

11. In the written statement filed by Smt. Kajal Roy in the present suit, it has been stated that the Will was not valid and was inoperative. The reasons as to why the Will was not valid and operative in the eye of law, has been stated in Paragraphs 11(i) to 11(viii) of the written statement.

12. It is contended before this court, that due to such denial of the validity of the Will, the

admission with regard to the existence of the Will in the earlier suit would be relevant and the written statement has to be proved.

13. In my opinion, the application which was filed for calling upon the learned advocate to prove the certified copy of the written statement of another proceeding was not the correct way to prove such document. The learned court had rightly rejected such prayer. The proper course for the petitioner would have been to pray before the court to call for the records of Title Suit No.17 of 1996 and then the petitioner could proceed in accordance with Section 145 of The Indian Evidence Act.

14. The revisional application is accordingly disposed of, without any interference with the order impugned.

15. All the parties are directed to act on the basis of the server copy of the order.

16. Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)