

**IN THE CIRCUIT BENCH CALCUTTA HIGH COURT
AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

**C.O. 94 of 2024
Sri Rajendra Prasad
Vs.
Sri Raj Kishore Prasad & ANR.**

For the petitioner	:Mr. Sandip Mandal, Adv. Mr. Abhilash Mittal, Adv.
For the Opposite Party no. 1	:Mr. Subham Ghosh, Adv. Mr. Mayank Roy, Adv.
For the Opposite Party no. 2	:Mr. Tridip Saha, Adv. Ms. Manisha Dutta, Adv.

Heard On :24.07.2024

Judgment On :29.07.2024

Bibhas Ranjan De, J. :

1. The instant revision application under Article 227 of the Constitution of India has been filed assailing order no. 11 dated 07.05.2024 passed by Ld. Additional District Judge, 1st Court, Siliguri, wherein Ld. Judge refused the prayer for amendment of written objection under Order 6 Rule 17 of Civil Procedure Code (for short CPC) on the ground of introduction of new cause of action along with new set of facts with regard to title of the bequeathed property.
2. Background of the dispute is that the respondent no. 1 filed an application under Section 278 of the Indian succession Act, 1925 (for short Act, 1925) before Ld. District Delegate (Civil Judge, Senior Division) at Siliguri which was registered as Misc. Judicial case no. 22 of 2021 with a prayer for granting letters of administration of the last will of one Kishan Prasad Kanoo, since deceased, dated 17.08.2005.
3. After receiving notice, the petitioner of this revision application entered appearance and filed written objection against the application under Section 278 of the Act, 1925. Accordingly, Ld. District Delegate transferred the case record to the Court of

Ld. District Judge, Darjeeling, where the same was treated as contested suit and renumbered as O.C (Probate) Suit No. 04 of 2022.

4. Ld. District Judge, Darjeeling, in tern, transferred the same to the Court of Ld. Additional District Judge, 1st Court at Siliguri for disposal. Thereafter, Petitioner of this case filed one application under Order 6 Rule 17 CPC for amendment of written objection on 09.06.2022 which was rejected by the Ld. Transferee Judge on 07.05.2024 which has been impugned in this revision application.
5. Ld. Counsel, Mr. Sandip Mandal, appearing on behalf of the petitioner has submitted that the nature of proposed amendment did not change the nature and character of the suit rather it was an elaborate description of the title of the testator.
6. In support of his contention, Mr. Mandal, relied on a case of ***Mohinder Kumar Mehra vs. Roop Rani Mehra and others reported in (2018) 2 Supreme Court Cases 132.***
7. Mr. Mondal has further relied on ***Smt. Radhika Devi &Anr vs. Ajay Kumar Sharma & ors reported in 2010 SCC***

Online pat 1487 (Single Bench) and ***Most Kewala Devi vs Krishna Devi reported in 2015 SCC OnLine Pat 10051 (Single Bench)*** and has tried to make this Court understand that the petitioner/defendant can amend the written objection incorporating the cloud over the title of the testator.

8. On the contrary, Ld. Counsel, Mr. Subham Ghosh, appearing on behalf of the respondents has contended that the title of the testator cannot be questioned in a probate suit which will only decide the execution of the will.
9. Mr. Ghosh has further submitted that the proposed amendment detailing the facts over the title of the testator was rightly refused by the Ld. Judge vide the impugned order.
10. In support of his contention, Mr. Ghosh, relied on the following cases:-
 - ***Ramchandra Ganpatrao Hande alias Handege vs. Vithalrao Hande and Others reported in 2011 AIR (Bombay) 136 (Division Bench)***
 - ***Jacob Cherian vs. Himanshu Kumar Mukherjee and another reported in 1993(1) Cal. H.C.N. 21 (Single Bench)***

Analysis:-

11. The application under Section 278 of the Act, 1925 was filed with a prayer for letters of administration and after filing of written objection that application was ultimately treated as probate suit being no. 04 of 2022.

12. It is settled proposition of law that under probate or letters of administration proceedings the court is not supposed to call upon to adjudicate the title of the property involved in the will. In ***Ramchandra Ganpatrao Hande*** (supra) it was decided in paragraph 14 which runs as follows:-

“14... The ambit of the words “all matters connected therewith” has to be construed in relation to the grant of probate and letters of administration. Such a proceeding does not concern itself with title or even the existence of the property but only determines whether the will was executed by the testator of his own free will. That being the ambit of the proceeding, the words” connected there with” cannot transform the probate proceeding into one in which issues alien to the grant of probate are to be decided...”

13. In ***Jacob Cherian*** (supra) this Hon’ble Court decided the principles governing consideration in an application to amend the written objection in paragraph 5 as below:-

“ 5. ... The governing consideration in an application to amend the written statement should be how far, if at all, the proposed amendment of a defence is necessary to determine the real controversy between the parties. If that test is not satisfied then the amendment should not be allowed even on the ground that there can be no real prejudice by the amendment and that the costs awarded against the amending party will act as the panacea for any possible inconvenience occasioned by the amendment. There, is always legal prejudice when irrelevant matters are allowed to be introduced by the amendment.”

14. Ratio decidendi of ***Mohinder Kumar Mehra*** (supra) is the court should allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

15. In ***Smt. Radhika Devi*** (supra) Single Bench of Hon'ble Patna High Court observed as follows:-

“ (26) The learned counsel for the appellant submitted that in the will, no property have been mentioned. It is only mentioned that the properties movable or immovable in the name of Fateh Bahadur Singh or in benami land shall go to Ajay Kumar Sharma. The learned counsel submitted that because the properties in the name of family is joint family property and

Fathen Bahadur Singh had no definite share, therefore, no particulars of his property has been mentioned but the plaintiff-respondent, Ajay Kumar Sharma of his own wish has given a list of properties in the probate application wherein all the joint family properties has been mentioned and, therefore, letters of administration cannot be granted with respect to the joint family property. In reply to this, the learned counsel for the respondent submitted that the probate Court cannot decide the title of the executor nor the appellant are entitled to raise this question. The learned counsel further submitted that the appellant cannot dispute the title of the executor of the will regarding the property.

(30) *In view of the above settled principles, the plaintiff-respondent is not entitled for letters of administration with respect to joint family property. Although the will is genuine one. It may be mentioned here that the property in the probate case are subject matter of partition Suit No. 123 of 1993. In that suit, it will be decided which property belonged to Fateh Bahadur Singh and what will be his share. Therefore, according to the learned counsel for the respondent himself the right title or interest of Fateh Bahadur Singh is yet to be decided which cannot be decided in the present probate case. According to the respondent, Ajay Kumar Sharma, the property mentioned in Schedule of probate application belong to Fateh Bahadur Singh. The learned counsel for the respondent submitted that the gift deed decided in favour of Fateh Bahadur Singh have been filed. As stated*

above, this issue cannot be decided in the probate case. Unless this question is decided by appropriate forum of competent jurisdiction, letters of administration cannot be granted because letters of administration is to be granted with respect to the property of the testator only. Here, the testator himself has not mentioned his property. The respondent is giving the details of the property which according to the objectors is joint family property. The learned counsel for the appellant submitted that whole of the joint family property has been mentioned in the probate application and nothing is left.

(31) *In the case of A. Raghavamma v. A. Chanchamma AIR 1964 (Supreme Court) 136, the Hon'ble Apex Court has held that Will could not be executed with respect to undivided share of the joint family property."*

16. In ***Most Kewala Devi*** (supra) Single Bench of Hon'ble Patna High Court observed as follows:-

“ 33. *After careful scrutiny of the aforesaid finding, it is crystal clear that will is to be executed with regard to the property which the testator possesses, and the dispute, if any, relating to the same is not to be scuttle down under proceeding brought under probate. However, different kind of picturization has to be perceived whereunder admittedly the property not belonging to testator have been bought up under deed of will. Then, is it found out of domain of probate proceeding, and if the*

principle so laid down, as referred above, is appreciated in its true spirit wherein, execution of Will relating to own property of testatrix is to be effected. Then certainly, it will come within the purview, as with regard to these properties neither probate nor letter of administration could be granted, otherwise it will allow multiplicity of the proceeding, which does not happens to be intention of legislature. Aforesaid view is found supported with Smt. Radhika Devi v. Ajay Kumar Sharma reported in 2011 (1) P.L.J.R. 845.”

17. I have gone through all the judgments relied on behalf of the parties.

18. In the case at hand, proposed amendment not only described the devolution of interest in copercenary property but also disputed the title of the testator which cannot be the real question in controversy in a probate suit involving only issue of execution of will. Respondent no. 1, by this proposed amendment virtually denied the authority of the testator to execute the will in question, which is not permissible in a probate suit, relying on the principle enunciated by the Hon’ble Division Bench in **Ramchandra Ganpatrao Hande**(supra).

19. In **Most Kewala Devi** (supra) & **Smt. Radhika Devi** (supra) Hon’ble Single Bench of Patna High Court dealt with a

will where there was no declaration that the subject property belonged to the testator.

- 20.** In the aforesaid view of the matter, I find no scope to interfere with the order impugned.
- 21.** As a sequel, the revision application being no. C.O. 94 of 2024 stands dismissed on contest without awarding any costs.
- 22.** All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.
- 23.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]