

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Supratim Bhattacharya

FA 336 of 2025
IA No: CAN 4 of 2025

Sri Siddhartha Mukherjee @ Siddhartha Mukhopadhyay
Vs.
Smt Jyotikona Banerjee

For the appellant : Mr. Subhabrata Bandyopadhyay
For the respondent : Mr. Arif Ali,
Mr. S. Bhattacharjee,
Mr. Bikash Kumar Roy
Heard on : 27.01.2026
Judgment on : 27.01.2026

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred against the grant of probate in respect of a Will in favour of the respondent.
2. Learned counsel for the appellant assails the impugned judgment granting probate primarily on the ground that the issues in the testamentary suit were framed subsequent to the evidence being led by both the parties, whereafter an application filed by the propounder/respondent for adoption of the propounder's witnesses' evidence was allowed. Even thereafter, when the present appellant,

who disputed the grant of probate, made an application for cross-examination of P.W. 1 and P.W. 2 on recall, on the ground that the adoption of evidence of P.W. 1 and P.W. 2 tantamounted to adduction of fresh evidence, entitling the present appellant to further cross-examine such witnesses, the learned Trial Judge refused to grant the same.

3. It is contended by learned counsel for the appellant that in the event a party is permitted to adopt its witnesses' evidence, it tantamounts to adduction of fresh evidence. The effect of such fresh evidence would be that the earlier evidence adduced by the self-same witnesses gets nullified, thereby reopening an opportunity to the other side to cross-examine the witnesses on the freshly adduced evidence.
4. In support of such contention, learned counsel cites *K.K. Velusamy vs. N. Palanisamy*, reported at (2011) 11 SCC 275, *Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra & Ors.* reported at AIR 2013 SC 58, and an unreported judgment in the matter of *M/s Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II*, passed in Civil Appeal No. 4228 of 2006.
5. Learned counsel also argues that it was recorded by the testamentary court in Order No.104 dated April 17, 2019 that time was sought by the propounder/present respondent for filing a death certificate. It is sought to be contended that the said order itself indicates that there was no death certificate of the testator on record on the relevant date and, as such, such death certificate must have been permitted to be adduced in evidence subsequently. It is contended that such further

evidence also entitled the appellant to cross-examine the propounder's witnesses.

6. Learned counsel appearing for the propounder/respondent opposes the contentions of the appellant and argues that even without the adoption of the evidence already led by P.W.1 and P.W.2, the effect would be that the learned testamentary court would be at liberty to look into the evidence adduced earlier. As such, it is submitted that no fresh evidence could be said to have been led merely by adoption of the earlier evidence which was already on record. Thus, no fresh right could have been said to be created in favour of the present appellant to further cross-examine the propounder's witnesses.
7. Learned counsel next points out that an earlier prayer of similar nature, seeking to recall P.W. 1 and P.W. 2 for the purpose of cross-examining them afresh, had already been refused by the learned Trial Judge and, as such, the learned testamentary court was justified in refusing the second similar prayer in any event.
8. Upon a careful consideration of the materials on record, we find that nothing turned on the order dated April 17, 2019, in which the testamentary court had merely recorded that the propounder had sought for time to file a death certificate. There is nothing on record to show whether the death certificate was filed or proved later.
9. In any event, learned counsel for the appellant does not pursue this line of argument further.

10. Insofar as the supposed right of the appellant to further cross-examine the propounder's witnesses, we do not find substance in the contention of the appellant.
11. Before the testamentary court, the pleadings of both the parties were already on record and the parties went to trial knowing fully well the issues which would have to be addressed by them in their evidence.
12. Moreover, the propounder adduced two witnesses, being P.W. 1 and P.W. 2, who were cross-examined at length by the present appellant.
13. Not stopping there, the objector/present appellant also adduced as many as three witnesses, being OPWs 1, 2 and 3 respectively, who were also cross-examined by the propounder/respondent. After the evidence was complete, it was pointed out to the testamentary court that issues had not been formally formulated, upon which, the learned testamentary court formally framed issues in the suit.
14. After framing of such issues, the first application was filed by the present appellant for recall of P.W. 1 and P.W. 2 for further cross-examination. A perusal of the said application dated December 13, 2019 shows that no reason whatsoever was assigned for seeking such recall. The only ground mentioned in the application was "for proper adjudication", which does not mean anything.
15. Such application was followed by an application by the propounder/present respondent dated December 19, 2019 praying for "necessary orders". In the body of the application, it was pleaded that the propounder had already adduced two witnesses, P.W. 1 and P.W. 2, by filing examination-in-chief and hence, the propounder was

thereby accepting and adopting the same chief of both the witnesses and no further modification or addition or deletion of any facts or circumstances were required to be made at that stage.

16. Vide Order No. 112 dated January 15, 2020, the court dealt with both the applications and allowed the application of the propounder dated December 19, 2019 for adopting the evidence taken earlier.
17. However, in the self-same order, the learned testamentary Judge elaborately recorded that the P.W. 1, P.W. 2 and OPWs 1, 2 and 3 had adduced evidence and were cross-examined and the evidence was completely recorded and the witnesses discharged.
18. It was further recorded that after the said transferee court, being the Additional District Judge, Second Court at Durgapur, receiving the case records, the evidence of OPW 4 was also recorded partly on July 11, 2017 and August 03, 2017 by the transferee court but deferred on the prayer of learned counsel for the opposite party (present appellant).
19. Subsequently, the testamentary court went on recording, after taking several adjournments, the opposite party filed a petition praying for closing the OPWs and on the prayer of the opposite party only the evidence of the OPWs stood closed and the case was fixed for arguments.
20. Thereafter, at the time of arguments on January 07, 2019, learned counsel for the petitioner drew the attention of the court, by filing a petition, to the fact that no issue was framed by the previous

Presiding Officer, upon which on April 17, 2019, the court formally framed the issues-in-question.

21. The learned Trial Judge further observed that power under Order XVIII Rule 17 of the Code of Civil Procedure, which was sought to be invoked by the present appellant at the first instance, can only be invoked as per convenience of the court, to enable the court to clarify any issue or doubt. However, such power was not intended to be used to fill omission in evidence of a witness who has already been examined in full and discharged.
22. The learned testamentary court also observed that on a careful reading of the petition dated December 13, 2019 filed by the objector/OP, it was revealed that it had not been specifically mentioned in the petition as to in what respect further cross-examination of P.W. 1 and 2 was essential and what are the essential questions which could not be put to them earlier. Both the parties, it was held, after understanding the crux of the case as well as keeping in view the statute, that is, the Indian Succession Act, conducted the case knowing the facts in issue in the case and therefore, absence of issue did not lead to mistrial, though issues had been framed afterwards.
23. We completely agree with such proposition of law as relied on by the learned testamentary court. Mere adoption of evidence by the self-same party, which led the evidence in the first place, does not make any difference insofar as the effect of the evidence is concerned. In fact, this Court is of the opinion that the order allowing the

propounder/present respondent to adopt her earlier evidence was a surplusage and superfluity. Nothing hinges on such so-called adoption, since the evidence of both the parties, including the propounder, was already on record irrespective of the formal framing of the issues or not. There was no necessity at all for the propounder to adopt evidence already led by the propounder herself as P.W.1 as well as another witness, being P.W.2.

24. Therefore, in any event, we deem such adoption to be a surplusage and the learned testamentary court rightly relied on the evidence of the parties already on record.
25. There are two other aspects of the matter which we must deal with. First, the earlier application for recall of P.W.1 and P.W.2 made by the objector/present appellant was at a time when neither the application for adoption of evidence was filed by the propounder/respondent nor was the same allowed.
26. Thus, the primary ground for seeking such recall was evidently to fill up the lacunae in the evidence already adduced by the opposite party/appellant.
27. The said application having been dismissed categorically on merits vide Order No. 112 dated January 15, 2020 and having not been challenged successfully, such dismissal attained finality.
28. Hence, the second application dated February 06, 2020 with the self-same prayer, that is, for cross-examination of P.W.1 and P.W.2, by mere change of the caption to Order XVIII Rule 4 of the Code of Civil Procedure, was *ex facie* barred by the principle of res judicata and

was rightly dismissed on such ground vide Order No. 114 dated February 17, 2020 passed by the testamentary court.

29. The other aspect of the matter is that evidence was initially led by both the parties at length. The witnesses of the parties were also cross-examined by each other. Thereafter, only at the behest of the opposite party was the further evidence of the OPWs closed. Hence, it cannot be said that the opposite party could have any grievance regarding not getting adequate opportunity to adduce independent evidence as well as cross-examine the propounder's witnesses.
30. As held by the testamentary court, both the parties went to trial and adduced evidence at length on the relevant issues, knowing fully well the issues required to be addressed by them.
31. Thus, nothing turned on the subsequent formal formulation of issues, which was a mere formality and did not change the material circumstances of the case.
32. Hence, such formal framing of issues did not give rise to any further cause of action for either of the parties to lead fresh evidence at all.
33. Insofar as the arguments of the appellant that due to adoption of the propounder of her earlier evidence, the same should be treated to be fresh evidence and a right ought to have been given to the appellant to cross-examine the witnesses of the propounder, we cannot accept the same, in view of our above observation that such permission to adopt earlier evidence was a mere surplusage.

34. We accordingly hold that even without such adoption, independently the testamentary court was entitled to and did examine the evidence already on record on behalf of the propounder.
35. In such view of the matter, since the self-same evidence was relied on by the propounder at all stages of the testamentary suit, there was no occasion for the court to grant fresh opportunity to the objector/appellant to reopen the entire gamut of the case, after having himself prayed for closure of the evidence, and/or to cross-examine the P.W.1 and P.W.2 afresh in order to cover up the objector's own lacunae.
36. Hence, we do not find any merit in the contentions of the appellant.
37. Insofar as the judgments cited by learned counsel for the appellant are concerned, those are not germane for the present adjudication.
38. In *K.K. Velusamy (supra)*, the Hon'ble Supreme Court observed that although there is no specific provision in the Code of Civil Procedure enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination, Section 151 of the Code can be resorted to in such circumstances in the absence of any provision.
39. It was further held that in the absence of any such provision, for the purposes other than securing clarification required by the court, the inherent power under Section 151 could be invoked in appropriate cases to reopen the evidence and/or recall the witnesses.
40. In the present case, there is no quarrel with such proposition. We are, however, not satisfied on the facts of the instant *lis*, as discussed

above, that this is an appropriate case where such power of recall ought to be exercised.

41. In *Ayaaubkhan Noorkhan Pathan (supra)*, the Hon'ble Supreme Court reiterated the well-settled proposition that affidavits within the meaning of Order XIX of the Code of Civil Procedure *per se* could not tantamount to evidence, unless directed by the court to be so construed.
42. However, under Order XVIII Rules 4 and 5, the contemplation of the amended Code of Civil Procedure is specifically to treat such evidence in chief to be in lieu of oral evidence of the parties.
43. In such view of the matter, the ratio laid down in *Ayaaubkhan Noorkhan Pathan (supra)* is not germane at all, as we are not dealing at all with a situation under Order XIX of the Code of Civil Procedure but regular affidavits in chief filed by the parties under Order XVIII Rule 4 of the Code.
44. Thus, the said judgment cannot be of any aid to the appellant in the present case.
45. Lastly, in *M/s Andaman Timber Industries (supra)*, it was observed by the Hon'ble Supreme Court that not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority in the said case, though the statements of those witnesses were made the basis of the impugned order, was a serious flaw which rendered the order a nullity.
46. The said proposition is not attracted to the present case in any manner whatsoever, since, in the case at hand, both parties led

evidence at length and also cross-examined each other's witnesses. It was only at the behest of the objector/present appellant that the evidence was ultimately closed.

47. Moreover, the other distinguishing circumstance here is that a previous application for recall of P.W. 1 and P.W.2 at the behest of the appellant himself had already been dismissed, which order had attained finality and operated on the principle of res judicata to debar the subsequent application on the self-same prayer.
48. Hence, the ratio laid down in *M/s Andaman Timber Industries (supra)* is also not relevant in the present context.
49. Accordingly, FA 336 of 2025 is dismissed on contest, thereby affirming the judgment and deemed decree dated March 16, 2020 passed by the learned Additional District Judge, Second Court at Durgapur, District: Paschim Bardhaman in O.S. (Will) Case No. 01 of 2017.
50. The connected application, bearing CAN 4 of 2025, stands disposed of accordingly as well.
51. There will be no order as to costs.
52. Urgent photostat certified copies of this judgment, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)