
(2011) 11 CAL CK 0015

Calcutta High Court

Case No: C.O. 3179 of 2011

Manju Mitra and Others

APPELLANT

Vs

Anil Krishna Paul

RESPONDENT

Date of Decision: Nov. 24, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 10, 151
- Succession Act, 1925 - Section 276, 295

Hon'ble Judges: Dipankar Datta, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury, Mr. Aniruddha Chatterjee and Mr. Vipul Kundalia, for the Petitioners, for the Appellant; B.K. Banerjee and Mr. Tulsi Das Roy, Advocate for the Opposite Party No. 1, for the Respondent

Final Decision: Dismissed

Judgement

Hon'ble Justice Dipankar Datta

1. This revisional application is directed against order dated August 29, 2011 passed by the learned Judge of Fast Track Court No. 1 at Barasat, 24 Parganas (N). By the order impugned, the learned Judge refused to stay trial of Other Suit No. 48 of 2008, arising out of an application for probate filed by the opposite party no.1, and thereby rejected the application u/s 10 read with Section 151, CPC filed by the petitioners. The petitioners are the widow, two sons and a daughter of Harihar Mitra (since deceased). According to them, Harihar Mitra had passed away on February 21, 2007 intestate.

2. Facts leading to the order impugned may be noted first.

3. The application of the opposite party no.1 u/s 276 of the Indian Succession Act 1925 filed before the Court of the learned District Delegate at Barasat was registered as Misc. Case No. 391 of 2007. Probate of a registered will dated May 5,

2006 said to have been executed by Harihar Mitra, whereby the testator had bequeathed his property situated at BC 188, Salt Lake, Sector-I, Kolkata-700064 and other movable and immovable properties, as mentioned in the schedule of the annexed will in favour of the opposite party, was prayed for. The petitioners entered appearance in the said misc. case on February 13, 2008 and filed their written objection. The misc. case having become contentious, the same was transferred to the Court of the learned District Judge at Barasat and renumbered as Other Suit No. 48 of 2008. It has since been re-transferred to the learned Fast Track Court No. 1 for decision.

4. One Siddhartha Nag (hereafter Siddhartha) also applied u/s 276 of the Act before the Court of the learned District Delegate at Sealdah on September 10, 2007, giving rise to Probate Case No. 41 of 2007. It was claimed in the application that Harihar Mitra had executed a will on June 25, 2001 bequeathing his Salt Lake property referred to above in favour of Siddhartha absolutely and for ever. According to the petitioners, the probate case filed by Siddhartha became contentious on March 15, 2008.

5. Despite filing written statement in O.S. No. 48 of 2008, the petitioners were not sincere in contesting it as a result whereof the suit was placed on ex-parte board for hearing. At this stage the petitioners filed three applications. By the first application, a prayer was made to remove the suit from ex-parte board; the second one purported to explain why step could not be taken on behalf of the petitioners before the trial Judge on May 5, 2009 and in the last one prayer was made for issuance of direction upon the propounder of the will to furnish photostat copy thereof with further direction upon the sherestadar to give inspection of the purported will of Harihar Mitra. The learned trial Judge by order dated July 27, 2009 rejected all the applications.

6. The said order dated July 27, 2009 was challenged by the petitioners before this Court by invoking its revisional jurisdiction. A learned Judge of this Court disposed of the revisional application by judgment dated September 4, 2009. His Lordship recorded how the petitioners were careless, negligent and remiss and had failed to show diligence in contesting the suit. However, keeping in mind that a probate Court is a Court of conscience, the order impugned was set aside upon imposing cost of Rs. 10,000/-. Direction was issued for furnishing copy of the will to the learned advocate for the petitioners and leave was also granted to them to take inspection of the original will in the presence of the sherestadar of the trial Court. It was further directed that upon such inspection, the petitioners would be entitled to file additional written statement. The suit was directed to be removed from the ex-parte board, subject to payment of costs by the petitioners and ex-parte evidence, if there be any, tendered by the opposite party was set aside and he was given liberty to tender fresh evidence.

7. After disposal of the civil revisional application, the petitioners complied with the direction for payment of costs and upon inspection of the original will have since filed their additional written statement in the trial Court.
8. It was at this stage that proceedings were initiated on November 26, 2009 by the petitioners for grant of letters of administration in respect of the estate of Harihar Mitra before this Court giving rise to P.L.A. No. 349 of 2009.
9. The petitioners then applied separately under Clause 13 of the Letters Patent for transfer of O.S. No. 48 of 2007 and Probate Case No.41 of 2007 to this Court, giving rise to ALP No.68 of 2009 and ALP No. 67 of 2009 respectively.
10. Siddhartha did not contest ALP No. 67 of 2009 and by order dated November 24, 2010, it was allowed directing transfer of Probate Case No. 41 of 2007 to this Court.
11. ALP No. 68 of 2009, however, was contested by the opposite party, who was the respondent therein. Considering the conduct of the petitioners while contesting O.S. No. 48 of 2008 as reflected in the order of the revisional Court dated September 2, 2009, the self-same learned Judge declined the prayer for transfer holding in His Lordship's order dated November 24, 2010 that the suit was not lingering for any lack of diligence on the part of the propounder. While disposing of ALP No. 68 of 2009, His Lordship directed the learned Judge of First Track Court No.1 to take up trial of O.S. No. 48 of 2008 pending before it with utmost expedition and to ensure that the trial is concluded within a period of eight months from receipt of the order.
12. The order on ALP No.68 of 2009 was received by the Fast Track Court No. 1 on January 10, 2011. Such Court was lying vacant till July 7, 2011. The learned Judge of the said Fast Track Court thereafter proceeded to try O.S. No. 48 of 2008 in terms of the order dated November 24, 2010. While PW1 was being cross-examined, the petitioners filed the application that stands rejected by the order under challenge. The learned Judge proceeded to reject the prayer of the petitioners only on the ground that this Court by its order dated November 24, 2010 had directed trial to be concluded within a period of eight months and, therefore, there was no merit in the application filed by the petitioners.
13. Assailing the order dated August 29, 2011, Mr. Roy Chowdhury, learned senior advocate for the petitioners contended that the learned Judge was clearly in error in rejecting the prayer for stay. According to him, by reason of the order dated November 24, 2010, the right of the petitioners to seek stay of trial of O.S. No. 48 of 2008 in terms of the provisions contained in Section 10 of the Code had not been taken away; therefore, the learned Judge acted illegally and with material irregularity in not appreciating that O.S. No. 48 of 2008 having been instituted after Probate Case No.41 of 2007, Section 10 of the Code was applicable and stay of the suit ought to have followed without much argument.

14. It was also contended by Mr. Roy Chowdhury that even if Section 10 of the Code were not applicable, nothing prevented the trial Court from staying trial of O.S. No. 48 of 2008 in exercise of its inherent powers saved by Section 151 thereof and reliance in this connection was placed on the Bench decision of this Court reported in [Atula Bala Dasi and Others Vs. Nirupama Devi and Another](#), wherein it was ruled as follows:

3. It is now well settled that a Court has jurisdiction to postpone the hearing of a suit which is pending before that court. The grounds for such postponement may be as under S. 10, Civil P. C, or, even when the grounds cannot be brought within the four corners of that section the Court has an inherent power of staying its own proceedings. Such inherent power to postpone the hearing of a suit, pending the decision of a selected action, may be founded on grounds of convenience. Such inherent power, is to be exercised to facilitate that real and substantial justice is done. See in this connection Abdul Alim v. Badaruddin Ahmed, 28 C. W. N. 295 and "Hukum Chand v. Kamalanand Singh, 33 Cal 927 at p. 932.

15. Finally, he argued that points raised on behalf of the petitioners in support of their prayer for stay of O.S. No. 48 of 2008 had not at all been considered in the proper perspective and decided by the trial Court and, therefore, jurisdiction vested in the Court has not properly been exercised.

16. He, accordingly, prayed that the impugned order be set aside and O.S. No.48 of 2008 stayed till disposal of Probate Case No.41 of 2007.

17. While defending the impugned order, it was contended by Mr. Banerjee, learned senior advocate that the revisional application is devoid of merit and has been preferred by the petitioners as part of a dilatory strategy to delay a decision on the suit. According to him, cross-examination of PW1 is in progress and, therefore, at this mature stage of the suit, interference would not at all be desirable either on facts or in law. Referring to the order dated November 24, 2010 passed while dismissing ALP No.68 of 2009, he contended that the Court desired that the decision on the suit be rendered without lingering it for too long and that in the event trial of the suit were stayed, that would amount to prolonging its life without any substantial progress and add to the ever increasing list of pending cases. Commenting on the conduct of the petitioners, it was further urged by referring to the decision of the revisional Court dated September 4, 2009 that the urgency with which the suit was directed to be decided by this Court exercising different jurisdictions would be absolutely frustrated.

18. Referring to Section 295 of the Act, Mr. Banerjee contended that O.S. No. 48 of 2008 could not be considered to be a suit instituted subsequent to Probate Case No. 41 of 2007. According to him, an application u/s 276 of the Act becomes a regular suit only upon the same becoming contentious and having regard to the dates on which O.S. No. 48 of 2008 and Probate Case No. 41 of 2007 became contentious, it is

clear that within the meaning of Section 10 of the Code, O.S. No. 48 of 2008 is the previous suit and, therefore, provisions of the said section cannot have any application.

19. The decision in *Atula Bala Dasi* (supra) was sought to be distinguished by Mr. Banerjee by urging that a former suit in exercise of inherent powers of the Court may be stayed if the latter suit that has been instituted is a more comprehensive suit compared to the previous one and not in a situation of the present nature where the propounders of the two wills are not the same and the issues are also not the same.

20. He, accordingly, prayed for dismissal of the revisional application.

21. I have heard learned senior advocates for the parties and considered the materials on record.

22. The object underlying Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue, to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in the previously instituted suit. The fundamental test to attract Section 10 is whether on final decision being reached in the previous suit, such decision would operate as *res-judicata* in the subsequent suit or not. Although on the authority of the decision in *Atula Bala Dasi* (supra) a Court may stay proceedings before it despite conditions prescribed in Section 10 of the Code not being fulfilled to facilitate real and substantial justice, such an order ought to be passed with great care, caution and circumspection and not on the drop of a hat. It would now be my endeavour, in the light of the above, to examine whether the learned Judge was justified in not granting the prayer of the petitioners for stay of O.S. No.48 of 2008.

23. I find substance in the contention of Mr. Banerjee that Section 10 of the Code cannot be availed of to stay the trial of O.S. No. 48 of 2008. Misc. Case No. 391 of 2007 was converted into a regular suit on February 13, 2008 before Probate Case No. 41 of 2007 became contentious on March 15, 2008. Regard being had to such fact, O.S. No. 48 of 2008 must, in the circumstances, be treated to be the previous suit. Even otherwise, decision on the suit of *Siddhartha* may not operate as *res judicata* insofar as O.S. Suit No.48 of 2008 is concerned. Also, *Siddhartha* has not filed any application ventilating a grievance that trial of O.S. No. 48 of 2008 and decision thereon would affect his pending suit. Reliance placed by the petitioners on Section 10 of the Code for obtaining stay of trial of O.S. No. 48 of 2008, therefore, appears to be thoroughly misplaced.

24. Turning to the second contention of Mr. Roy Chowdhury based on the ruling in *Atula Bala Dasi* (supra), I find such contention to be equally without merit. Inherent power of the Court must be exercised sparingly in exceptional cases for securing the ends of justice and not in a routine manner. Apparently, the will in respect whereof

the opposite party has applied for probate is dated May 5, 2006 whereas Siddhartha has applied for probate of a will dated June 25, 2001. In view of the subsequent will dated May 5, 2006, the will dated June 25, 2001 may not survive unless of course it is established that the will dated May 5, 2006 is not genuine and the will dated June 25, 2001 is the last will of Harihar Mitra. That apart, the will dated May 5, 2006 was registered which the will dated June 25, 2001 is not. Considering these aspects and further having regard to the fact that Siddhartha has shown utter disinterest in prosecuting his suit as well as in contesting the Clause 13 application before this Court, as recorded in the order dated November 24, 2010, it is difficult to hold the view that despite O.S. No. 48 of 2008 being the previous suit, in the interest of justice, the same ought to have been stayed in exercise of the inherent power of the trial Court.

25. I consider the reasons assigned above to be good enough for declining the prayer for stay made by the petitioners and even though the learned Judge of the Fast Track Court may have declined the prayer of the petitioners on the sole consideration of the order dated November 24, 2010, the ultimate conclusion reached by him does not deserve to be disturbed. The trial of O.S. No. 48 of 2008 must be allowed to proceed unhindered to ensure speedy disposal thereof as desired by this Court while disposing of ALP No. 68 of 2009.

26. The revisional application stands dismissed without order for costs. Photostat certified copy of this order may be furnished to the applicant at an early date.