(2012) 1 CHN 126

Calcutta High Court

Case No: C.O. 2762 of 2005

Ashoka Dhar and Another		APPELLANT
	Vs	
Dr. Partha Banerjee and Others		RESPONDENT

Date of Decision: Aug. 19, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 11 Rule 15, Order 22 Rule 10, Order 22 Rule 4, Order 39 Rule 1, Order 39 Rule 2
- Constitution of India, 1950 - Article 141, 227
- Succession Act, 1925 - Section 276, 283, 283(1), 284

Citation: (2012) 1 CHN 126

Hon'ble Judges: Dipankar Datta, J

Bench: Single Bench

Advocate: Sabyasachi Bhattacharya, Animesh Dhar and Dibyendu Chatterjee, for the Appellant; Bidyut Kumar Banerjee and Shila Sarkar, for the Opposite Parties 1 to 3 in C.O. 2762 of 2005, Subir Sanyal and Ratul Biswas for the Opposite Parties 2 to 4 in C.O. 29 of 2008 and Hiranmoy Bhattacharya and Apratim Bhattacharya for the Opposite Party No. 4 in C.O. 2762 of 2005, for the Respondent

Judgement

Dipankar Datta, J.
These two revisional applications arise out of orders passed by the trial Courts in independent proceedings but have been heard together in pursuance of an order dated July 3, 2008 of the Hon''ble the Chief Justice and, accordingly, shall stand disposed of by this common judgment and order.

2. The Petitioners in both the applications are common. The first Petitioner is the widow of Ashim Kumar Dhar (since deceased) (hereafter Ashim), whereas the second Petitioner is the son of the first Petitioner, born in her wedlock with Ashim.

3. Subject matter of challenge in C.O. No. 2762 of 2005 (hereafter the former application) is order No. 12 dated July 29, 2005 passed by the learned Chief Judge, City Civil Court in L.A. Case No. 69 of 2004. In C.O. No. 29 of 2008 (hereafter the latter application), order No. 142 dated December 18, 2007 passed by the learned Judge, 10th Bench, City Civil Court at Calcutta in Title Suit No. 1884 of 1991 is under challenge.

4. The material facts relevant for decision on the applications are noted first.

5. A certain Nanibala Dhar (since deceased) (hereafter Nanibala) by a will dated December 2, 1965 had bequeathed all her properties to Ashim by appointing him as the sole executor. After the death of Nanibala in 1979, Ashim, as the sole executor, had applied on July 28, 2004 for grant of probate of her will before the learned Chief Judge, City Civil Court at Calcutta, giving rise to Probate Case No. 69 of 2004.

6. During pendency of the said probate case, Ashim passed away on November 9, 2004. The Petitioners being the heirs of Ashim, who was the sole beneficiary of the will executed by Nanibala, filed an application before the Court for converting the said probate case into a case for grant of letters of administration. The conversion was duly allowed.

7. In terms of an order dated 15th March, 2005, a notice was published in the issue dated March 23, 2005 of the Bengali daily "Bartaman" for general citation regarding the letters of administration case. Interested parties were called upon to lodge objection by 8th April, 2005 failing which the said case would proceed ex parte.

8. Consequent to publication of the said notice, Dr. Partha Banerjee (hereafter Dr. Partha), Smt. Aparna Banerjee (hereafter Aparna) and Smt. Sanjukta Banerjee (hereafter Sanjukta) filed an application before the trial Court praying for direction upon the Petitioners to produce the will executed by Nanibala for inspection and/or to deliver photocopy thereof to them. One other application claiming similar relief was filed by Sri Rajesh Dhar (hereafter Rajesh), claiming himself to be the constituted attorney of one Dr. Ramesh Chandra Dhar (hereafter Dr. Ramesh). Dr. Partha, Aparna, Sanjukta and Rajesh shall hereafter be referred to as the applicants.

9. In their objection dated 7th April, 2005, Dr. Partha, Aparna and Sanjukta claimed that Nanibala while being absolutely seized and possessed of premises No. 79/4G, Raja Naba Krishna Street, Kolkata-700 005 (hereafter the said premises) had created a trust in respect thereof by a registered deed of settlement dated 28th December, 1972, appointing thereby her adopted son Dr. Ramesh as the sole trustee with liberty to sell the said premises; that, by virtue of a registered deed of conveyance dated 31st May, 2004, the said Dr. Ramesh, with the consent of the beneficiaries, sold and transferred all right, title and interest in the said premises to Dr. Partha, Aparna and Sanjukta and put them in possession of the entire first and second floors as also part of ground floor of the said premises for valuable consideration mentioned therein; that on noticing the publication in

the "Bartaman", Dr. Partha, Aparna and Sanjukta considering themselves to be interested and necessary parties intended to lodge their objections in respect of the alleged will of Nanibala which, according to them, is a fabricated document; that Dr. Ramesh during his tenure as trustee had instituted T.S. No. 1884 of 1991 against his licensee, the said Ashim, upon revocation of licence; that the suit is pending before the learned Judge, 10th Bench, City Civil Court wherein Dr. Partha, Aparna and Sanjukta have filed an application under Order 22 Rule 10, CPC (hereafter the Code) for being added as parties; and that, in the circumstances, the Petitioners ought to be directed to produce the alleged will for inspection and/or to deliver photocopy thereof for filing effective objection to the aforesaid letters of administration case and to contest it.

10. In his objection dated 8th April, 2005, Rajesh claimed himself to be the constituted attorney of Dr. Ramesh and while expressing interest to contest the letters of administration case prayed for direction of the Petitioners to supply the copy of the will and copy of the application for granting letters of administration for filing an objection there against.

11. The Petitioners lodged objections against the aforesaid two applications. According to them, the applicants were strangers having No. relation with Nanibala in any manner whatsoever and, therefore, have No. interest in the properties that were bequeathed in favour of Ashim by her and thus they are not entitled in law to claim any right either to inspect the will or to pray for supply of photocopy thereof. Accordingly, they prayed for rejection of the two applications.

12. The learned Chief Judge considered the applications. By order No. 12 dated July 29, 2005, the objections were disposed of. He was of the view that opportunity to inspect the will would serve the purpose of the applicants and hence, while rejecting their prayer for supply of photocopy of the will, the Petitioners were directed to file the will in original before the Court positively by 18th August, 2005 and if the same is filed on that date, the learned advocates for the applicants were given the liberty to inspect the same in the presence of the dealing assistant.

13. In connection with T.S. No. 1884 of 1991 instituted by Dr. Ramesh, referred to above, the Petitioners after demise of Ashim had filed an application under Order 22 Rule 4 read with Section 151 of the Code praying for their substitution in his place. The application was allowed by the trial Court and the Petitioners have been substituted as Defendants 1 and 2 in the suit. During pendency of the suit, Dr. Partha, Aparna and Sanjukta had applied for their addition as Plaintiffs 2, 3, and 4, as noticed above, and the said application was allowed by the trial Court with liberty to the Petitioners to file additional written statement. After their addition as Plaintiffs, Dr. Partha, Aparna and Sanjukta intended to contest an application under Order 39 Rules 1 & 2 of the Code filed by the Petitioners. There was reference in the said application to the will of Nanibala and hence they filed an application under Order 11 Rule 15 of the Code for inspection of the will executed by her. The Petitioners filed a written objection thereto. Upon hearing the

parties, the learned Judge by order No. 142 dated 18th December, 2007 allowed the said application under Order 11 Rule 15 of the Code and directed the Petitioners to furnish to them copy of the will and/or to show the same in open Court in presence of the bench clerk and the learned lawyers for the parties by 10th January, 2008.

14. It is noted that in C.O. No. 2762 of 2005, Dr. Partha, Aparna, Sanjukta and Rajesh were originally impleaded as the opposite parties. Dr. Ramesh was impleaded as the fifth opposite party in terms of an order passed by a learned Judge of this Court on 2nd September, 2009.

15. Despite attempts, Dr. Ramesh could not be served copies of the revisional applications. The parties including Rajesh were even not aware as to whether he is alive. Be that as it may.

16. Mr. Sabyasachi Bhattacharya, learned advocate representing the Petitioners while arguing the former application urged that the learned Chief Judge erred in passing the order impugned overlooking the fact that No. power of attorney was produced on behalf of the applicants. As a corollary to this point, it was argued that the power of attorney ought to have been registered in terms of the provisions contained in the Registration Act and since the power of attorney had not been produced, there was No. scope for the learned Chief Judge to ascertain whether it was registered or not. It was contended that the applicants have No. caveatable interest and, therefore, cannot seek inspection of the will. Finally, it was his contention that the trust deed had also not been produced. Based on the above, it was submitted that No. prima facie case was established to show caveatable interest of the applicants and, therefore, the order impugned is liable to be set aside by this Court in exercise of revisional jurisdiction.

17. While assailing the order dated December 18, 2007 passed by the learned Judge impugned in the latter application, Mr. Bhattacharya contended that the learned Judge acted illegally and with material irregularity in not complying with provisions contained in Rules 16 to 20 of Order 11 of the Code and thereby occasioned grave failure of justice.

18. Mr. Banerjee, learned senior advocate representing Dr. Partha, Aparna and Sanjukta in the former application contended that in terms of Section 276 of the Succession Act, 1925 (hereafter the Act), the executor of a will applying for grant of probate must annex the will with the application, with a statement that the will so annexed is the last will and testament of the testator and this being a mandatory requirement of the statute has to be complied with. In support of his contention, Mr. Banerjee relied on the decision of a learned single Judge of this Court reported in In Re: Madhav Prasad Birla (D),] wherein it was ruled that when grant of probate is sought to be asked in relation to a testamentary instrument, the competent Court of law cannot entertain any application primarily without having received the original thereof. Reference was also made to provisions contained in Section 283 of the Act, which permits participation in the proceedings before grant as prayed for. According to him, the impugned order requires nothing more than compliance

with the requirements of the statute and once the will in original becomes part of the Court''s records, it is competent to allow inspection of its records to the interested parties. It was further contended that by passing the impugned order dated 29th July, 2005, the learned Chief Judge recognized the right of an interested party to have inspection of the Court''s records on the basis of a registered deed of sale.

19. It was further contended that the probate Court is not required, at this stage, to enter into questions of title but if a party could show a slight interest or a bare possibility of an interest in the estate of Nanibala, that would entitle such party to entire caveat in the probate proceedings. Reliance in this connection was placed on the decisions reported in G. Gopal Vs. C. Baskar and Others, and 2002 (1) CHN 303 (Binoy Krishna Banerjee and Anr. v. Sadhan Ranjan Banerjee).

20. While concluding, Mr. Banerjee submitted that the order impugned does not suffer from any error of law and the learned Chief Judge having acted within jurisdiction, No. interference is called for.

21. Mr. Sanyal, learned advocate representing Dr. Partha, Aparna and Sanjukta in the latter application contented that Nanibala and her husband had No. issue; Nityananda Dhar, brother in law of Nanibala (the brother of Nanibala''s husband) had six children; Dr. Ramesh and a certain Sudhir Dhar were two out of the said six children of Nityananda, and Ashim is the son of Sudhir; the will was allegedly executed in 1965, whereas Nanibala created trust by way of a registered deed of settlement in 1972, appointing Dr. Ramesh as the sole trustee of the trust property; Dr. Ramesh filed suit for eviction of Ashim from the said premises in 1991; and after purchase of the said premises in 2004, Dr. Partha, Aparna and Sanjukta have been added as Plaintiffs. More than 13 years after institution of the suit for eviction, the probate case was filed, which is nothing but a mala fide attempt on the part of Ashim to grab the said premises. After being added as co-Plaintiffs, Dr. Partha, Aparna and Sanjukta filed an application under Order 11 Rule 15 of the Code for supply of copy of the will on 15th May, 2005. It is contended by him that since interest in the suit premises has been derived by the registered deed of sale executed by and between the constituted attorney of Dr. Ramesh on the one hand and Dr. Partha, Aparna and Sanjukta on the other, they are entitled to inspect the will allegedly executed by Nanibala and, therefore, the trial Court rightly passed the order under challenge which does not require any interference.

22. Mr. Hiranmoy Bhattarcharya, learned advocate representing Rajesh supported the contentions advanced by Mr. Banerjee and Mr. Sanyal.

23. I have heard learned advocates for the parties and perused the materials on record.

24. Before I proceed further, it would be proper to make a survey of the decisions of the Supreme Court in relation to "caveatable interest" and under what circumstances a non-party could be allowed to intervene in a proceeding for grant of probate or letters of

administration.

25. In G. Gopal (supra), cited by Mr. Banerjee, the learned Judges of the Supreme Court were of the view that the Respondents, who were grand children of the testator claiming interest in his estate on the basis of a settlement deed executed by the testator himself, which admittedly was revoked later on, had caveatable interest in the estate of the testator and, therefore, were entitled to notice before the final order is passed. Their Lordships opined that

(I)t is well-settled that if a person who has even a slight interest in the estate of the testator is entitled to file caveat and contest the grant of probate of the will of the testator.

26. Prior to the decision in G. Gopal (supra), another bench of two learned Judges of the Supreme Court in its decision reported in Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others, had the occasion to observe that a caveatable interest is an interest in the estate of the deceased testator which may be affected by grant of probate of the will of the deceased. The test required to be applied is: Does the claim of grant of probate prejudice the right of the caveator because it defeats some other line of succession in terms whereof the caveator asserted his right? It was further held that what would be the caveatable interest would depend upon the fact situation obtaining in each case and No. hard-and-fast rule, as such, could be laid down. In paragraph 109 of the decision, Their Lordships held:

It is in that backdrop the question which is required to be posed is: Did the Calcutta High Court or the other High Court opine that even a busybody or an interloper having No. legitimate concern in the outcome of the probate proceedings would be entitled to lodge a caveat and oppose the probate? The answer thereto, in our opinion, must be rendered in the negative. If anybody and everybody including a busybody or an interloper is found to be entitled to enter a caveat and oppose grant of a probate, then Sections 283(1)(c) and 284 of the 1925 Act would have been differently worded. Such an interpretation would lead to an anomalous situation. It is, therefore, not possible for us to accede to the submission of the learned Counsel that caveatable interest should be construed very widely.

27. These two decisions were considered by another bench of two learned Judges of the Supreme Court. In the decision reported in Shri Jagjit Singh and Others Vs. Mrs. Pamela Manmohan Singh, the learned Judges were of the view that conflicting views had apparently been expressed by coordinate benches on the interpretation of the expression "caveatable interest". The learned Judges felt that the issue deserves to be considered and decided by a larger bench and, accordingly, directed the registry to place the matter before the Hon"ble the Chief Justice for appropriate order.

28. Having regard to the aforesaid decision in Jagjit Singh (supra), it can safely be concluded that there is No. declaration of law on the point by the Supreme Court that

could be regarded as binding on me as precedent under Article 141 of the Constitution and it would be unsafe to proceed acknowledging the pronouncement in either Krishna Kumar Birla (supra) or G. Gopal (supra) as the settled law. It would, however, not preclude me to decide the issue raised herein based on the ratio decidendi of other decisions considering Section 283 of the Act.

29. Reference may be made to the decision of the Supreme Court reported in Ghulam Qadir Vs. Special Tribunal and Others, and the Bench decisions of this Court reported in Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, , Haripada Saha and Another Vs. Ghanasyam Saha and Another 1983 (1) CLJ 169 (Saral Patwar v. Smt. Sushila Dassi) and Binoy Krishna Banerjee (supra).

30. In Ghulam Quader (supra), the Supreme Court reiterated the law that grant of probate conclusively establishes valid execution of the will and appointment of the executor but does not establish more than the factum of the will, as the probate Court does not decide question of title or of the existence of the property mentioned therein.

31. In Nabin Chandra Guha (supra), the Bench noted that the words in Section 283 of the Indian Succession Act, 1925 that "all persons claiming to have any interest in the estate of the deceased" have from time to time been explained by judicial decisions. Applying the law laid down in various decisions, it was held by the Bench that a purchaser from an heir after the death of the testator has a locus standi and to have it, it is not necessary for the objector to show that he had an interest in the estate at the time of the testator''s death.

32. While holding that the trial Court was not justified in refusing the Petitioners an opportunity to contest the probate proceedings, the Bench in Haripada Saha (supra) ruled that

(I)t is well-settled that any interest, however, slight, and even the bare possibility of an interest is sufficient to entitle a person to enter caveat in a probate proceeding.

33. In Saral Patwar (supra), the Bench clearly laid down the law, on interpretation of Section 283(1) of the Act, that the expression "claiming to have any interest in the estate of the deceased" appearing therein is wide enough to include persons having possibility of an interest and in case his interest is such as is or is likely to have prejudicially or adversely affected by the grant, a person would be qualified to receive citation.

34. The view expressed in the earlier Bench decisions noted above has been echoed in the decision in Binoy Krishna Banerjee (supra).

35. Notwithstanding the fact that a larger Bench of the Supreme Court might be in seisin of the issue that has been referred to it by the learned Judges in Jagjit Singh (supra), nothing precludes me to decide this application being guided by the Bench decisions of this Court, which are binding on me. Although in Krishna Kumar Birla (supra) it was held

that the view expressed in Nabin Chandra Guha (supra) is not entirely correct, the other Bench decisions referred to above interpreting Section 283 of the Act in wide terms went unnoticed and, therefore, there could be No. impediment to apply the law laid down therein [particularly when the propositions of law in paragraph 86 of the said decision in Krishna Kumar Birla (supra) stand substantially diluted by the observations in paragraph 103 thereof].

36. Here, the alleged transfer of the said premises by way of sale occurred nearly 13 years before institution of the probate/letters of administration case and Dr. Partha, Aparna and Sanjukta have questioned the will itself in their application filed in response to the notice. Whatever be the worth of the allegations made by them, it cannot be said that they have absolutely No. interest in the estate of the deceased. The purchase that they have made stands the risk of being affected if the terms of the will were to be made effective.

37. Mr. Banerjee is right in his contention that the application for grant of probate filed by Ashim ought to have been accompanied by the will of Nanibala, in original. The decision in Madhab Prasad Birla (supra), upon construing Section 276 of the Act, is an authority for the proposition that excepting cases under Sections 237, 238 and 239 of the Act, an application for probate or for grant of letters of administration has to be filed with the will in original, if available, and that such requirement is mandatory and the Court cannot dispense such requirement under any circumstance. The direction for filing the original of the will executed by Nanibala by part of the impugned order dated 29th July, 2005 cannot be faulted at all.

38. Now, the question that is to be addressed is whether the applicants are entitled to inspection thereof. Mr. Banerjee is again right in his contention that Dr. Partha, Aparna and Sanjukta by dint of the registered deed of sale by which right, title and interest in respect of the said premises has been transferred to them have been able to demonstrate sufficient interest to contest the case for grant of letters of administration and, therefore, they are entitled to take inspection of the will, which would form a part of the Court''s record once the direction in the order dated 29th July, 2005 is complied with. The right to take inspection would carry with it the right to take notes there from and I am of the considered view that the grounds urged by Mr. Bhattacharya to have the said order set aside are not legal, valid, proper and tenable to deny Dr. Partha, Aparna and Sanjukta the right to take inspection. Whether the power of attorney executed by Dr. Ramesh in favour of Rajesh is in existence or ought to have been registered or not and further whether at all Nanibala created a trust or not are questions not required to be answered by this Court while examining propriety of the orders impugned. It has been ascertained in course of hearing that the Petitioners have instituted a separate suit (T.S. No. 1238 of 2004), which is pending on the file of the learned Judge, 10th Bench, City Civil Court against Dr. Ramesh and others. The questions urged by Mr. Bhattacharya in all likelihood would come up for decision in such suit and, hence, No. opinion is expressed.

39. Rajesh being the constituted attorney of Dr. Ramesh, the transferor, in my view, is similarly entitled to inspect the will.

40. I am of the considered view that by passing the order impugned, the learned Chief Judge has not acted beyond the bounds of his authority or has not passed a perverse order or has not acted in flagrant violation of the fundamental principles of law and justice so as to warrant interference in exercise of power conferred by Article 227 of the Constitution of India.

41. I, therefore, find No. merit in the former application. C.O. 2762 of 2002, accordingly, stands dismissed.

42. In so far as the latter application is concerned, it is true that the learned Judge disposed of the application under Order 11 Rule 15 of the Code dated May 5, 2005 without compliance with the requirements of the statute. But considering the fact that C.O. 2762 of 2002 stands dismissed, as a result whereof the applicants would have the liberty of taking inspection of the will, I do not feel inclined to disturb their entitlement and to pass any further order on the latter application except that the direction for showing the will in the presence of the bench clerk stands set aside and that the applicants shall be entitled to file their respective written objections to the injunction petition dated 30th March, 2006 filed by the Petitioners within three weeks from the date of inspection of the will. The learned Judge shall, thereafter, proceed to dispose of the application for injunction as well as the suit, as early as possible. C.O. 29 of 2008 stands disposed of accordingly.

43. In view of the aforesaid order, CAN 1634 of 2011 also stands disposed of. Photocopy of this judgment and order, duly counter-signed by the Assistant Court Officer, shall be retained with the records of C.O. 29 of 2008.

Urgent photostat certified copy of this judgment and order may be furnished, if applied for, to the applicant as expeditiously as possible.