

(2004) 07 CAL CK 0054

Calcutta High Court

Case No: F.M.A.T. No. 3431 of 2003

Chayan Dutta Roy

APPELLANT

Vs

Chayanika Chatterjee and
Another

RESPONDENT

Date of Decision: July 19, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 17
- Succession Act, 1925 - Section 265, 288, 288(2), 299, 388

Citation: (2005) 2 CALLT 631 : (2005) 1 CHN 115

Hon'ble Judges: Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: Ranajit Chatterjee, for the Appellant;

Final Decision: Allowed

Judgement

D.K. Seth, J.

In Re: CAN 3174 of 2004

1. We had permitted withdrawal of the Memorandum of Appeal along with the certified copy of the judgment and decree of the lower Court for the purpose of presenting the same before the learned District Judge, Howrah by our order dated 4th March, 2004, It appears that our attention was not drawn to the fact that the said appeal was not governed u/s 388 of Indian Succession Act, on the impression whereof we had granted such permission. The learned Counsel for the respondent, who had lodged caveat before the learned District Delegate in the proceeding under Part IX of the Indian Succession Act, points out that the order cannot be sustained, therefore, he had prayed for recalling of the said order. Notices were directed to be given to the appellant as well as to the learned Counsel representing the appellant. Notices have since been served upon the appellant and affidavit-of-service has since been filed. Acknowledgement Card has since come back. Notices have also been

served upon the learned Counsel representing the appellant but he declined to appear though accepted the notice on the ground that the appellant had taken away the brief and he has no instruction. We remember to have requested the learned Counsel for the respondent to convey our desire to the learned advocate for the appellant, to appear before us. The learned counsel for the applicant/respondent submits that he has intimated our desire through a written notice, which is part of supplementary affidavit-of-service. It is unfortunate that the learned Advocate did not care to appear despite our request. We are sorry to note that the learned counsel despite being requested does not appear. We expected minimum courtesy from a learned Lawyer.

2. Since our attempt to secure representation of the appellants have failed, we take up the matter today after having successively adjourned the same on earlier occasions.

3. Our attention was not drawn to the fact that this was an appeal refusing appointment of receiver by the learned District Delegate in a proceeding under Part IX of the Indian Succession Act, after being contentious on the lodging of the caveat by the applicant/respondents in the proceeding before the learned District Delegate. Section 265 of the Indian Succession Act empowers the High Court to appoint such judicial officers within the district to act for the District Judge as delegates to grant Probate and Letters of Administration in non- contentious cases within the prescribed local limits. In the present case, our High Court established by the Royal Charter has appointed District Delegate in the concerned Districts before whom the proceedings was initiated by the appellants. As soon as caveat was lodged and the matter became contentious, by reason of Section 288 of the Indian Succession Act, the District Delegate could not continue with the proceedings and he was supposed to return the application to the applicant/appellant along with the documents, unless he impounded any of them, for being presented before the learned District Judge. It is contended on behalf of the applicant/respondent that ultimately the application had since been returned and presented before the learned District Judge before whom the proceeding is now continuing.

4. An appeal against an order passed under Part IX lies before the High Court in terms of Section 299 of the Indian Succession Act. The scheme of Part IX and Part X are altogether distinct, different and independent and operates in two different fields relating to Probate, Letters of Administration on the one hand and succession certificate on the other. By no stretch of imagination, principle of Section 388 can be inducted in relation to a proceeding under Part IX. Effect of Section 388 confines to the scope and ambit of Part X. There is a marked distinction between Section 265 and Section 388 in relation to District Delegates. Different provisions have been engrafted in Section 388, which is distinct from Section 265. Section 265 read with Section 288 makes the situation clear, Section 265 is confined only in respect of the non-contentious cases. The District Delegate has no power to deal with contentious

cases. Therefore, there is no scope of appeal before the learned District Judge from an order passed by the District Delegate empowered u/s 265. The scheme of Part IX is sufficiently clear and the principle of Section 388 cannot be borrowed while dealing with orders passed by the District Delegate empowered u/s 265 in a proceeding under Part IX.

5. Therefore, the appeal if there be any, would lie before this High Court. When the proceeding has been commenced before the learned District Judge, it would be open to any of the parties to apply for any interlocutory relief's before the learned District Judge and any appeal in respect of a proceeding which is no more pending before the learned District Delegate could validly be maintained. Any order the might have been passed by the learned District Delegate would be subject to any order that might be passed by the learned District Judge after withdrawal of the application and presentation thereof before him.

6. In this case another anomalous situation would arise, if appeal were permitted before the learned District Judge. Inasmuch as the learned District Judge would deal with the contentious probate proceedings as an original Court in respect of the same matter ceased to be pending before the learned District Delegate since presented to the Court of the Learned District Judge after return on being contentious. A Court where the proceeding was supposed to be initiated cannot act as the Court of Appeal over such proceedings initiated before the District Delegate of that Court when the statute provides that on being contentious the same is to be returned by the District Delegate for being presented before it.

7. In this case no order was passed on the application for appointment of receiver and as such the order of refusal ceased with the withdrawal of the proceedings and it would be a fresh proceeding before the learned District Judge. Be that as it may, since the appellant is not appearing, we cannot dispose of the appeal on merit in view of Order 41 Rule 17 of the Code of Civil Procedure. However, in the facts and circumstances of this case, we, think that the order dated 4th March, 2004 was passed on wrong premise. Therefore, the same is liable to be recalled.

8. The learned counsel for the respondent has drawn our attention to the decision in [Hirak Roy Vs. S.K. Roy and Others](#), ; Karunamoyee Sett and Ors. v. Lakshmi Rani Debi @ Khudubala Debi, CLT 1993(2) HC 177. In Karunamoyee Sett (supra) the Division Bench of this Court had held that there is a distinction between the exercise of power under Part X of the Indian Succession Act by a District Delegate u/s 388 appointed by the notification issued by the State Government and that of a District Delegate appointed by the High Court u/s 265 of the Act dealing with Probate and Letters of Administration in non-contentious case. Because of such distinction the provisions of Section 388(2) cannot at all be applied.

9. We are in agreement with the said decision, however, we would like to add one more reason to support the said decision namely that the appeal is distinctly

provided in Section 299 of Part IX which is somewhat different from those provided Section 288(2) and the corresponding Section 265 which does not provide for an appeal and that these provisions are engrafted in two different parts, namely, Part IX and Part X dealing with two different matters and operating in two different fields viz: Probate and Letters of Administration under Part IX and Succession Certificate under Part X. According to the scheme, both the parts appear to be a complete Code in itself and are not inter-dependent so as to borrow any principle from one or the other.

10. In *Hirak Roy (supra)*, this Court had held that the granting of Probate and Letters of Administration by virtue of application of Section 288 of Indian Succession Act are regulated by the CPC and the appeal, u/s 299 also refers to an appeal within the meaning of CPC and that the District Delegate functioning within the framework has delegated authority as conferred on the District Judge. Any order passed by him is subject to appeal before the High Court in accordance with the provisions of CPC as applicable to the appellants. The reasons given in the decision in *Hirak Roy (supra)* support the view we have taken in this case.

11. In the result, the application succeeds. The order dated 4th March, 2004 is hereby recalled. Since, after this order is passed, our attempt to secure presence of the appellant through service upon the appellants and upon their counsel having failed, we treat the appeal as on day's list for hearing and dismiss the same for default/non-prosecution.

12. Xerox plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned counsel for the applicant/respondent on usual undertaking.

R.N. Sinha, J.

13. I agree.