Manju Bhattacharya (deceased) represented by Smt. Lily Bhattacharya and Others Vs Gopal Ghosh and Others

Court: Calcutta High Court

Date of Decision: June 20, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 1 Rule 10, Order 22 Rule 3, 151
Constitution of India, 1950 â€" Article 227
Succession Act, 1925 â€" Section 213, 283(1)

Citation: (2012) 2 CHN 775

Hon'ble Judges: Dipankar Datta, J

Bench: Single Bench

Advocate: B.K. Banerjee II, for the Appellant;Debapriya Biswas, for the Respondent

Judgement

Dipankar Datta, J.
This revisional application under Article 227 of the Constitution of India is directed against order No. 17 dated March

31, 2005 passed by the learned District Judge, Howrah in L.O.A. Case No. 20 of 2000 (hereafter the said case). By the said order, the learned

Judge was pleased to allow an application under Order I Rule 10, CPC (hereafter the Code) read with Section 151 thereof (hereafter the said

application) filed by the opposite parties 1 to 4 herein and thereby directed their impleadment as additional opposite parties in the said case.

2. It appears from the impugned order that one Tulsibala Debi (since deceased) (hereafter the testatrix) was the owner of holding No. 13, Bhairab

Ghatak Lane within P.S. Malipanchghora in the district of Howrah (hereafter the said property); that she had executed a will on March 23, 1982,

duly registered, bequeathing the said property jointly in favour of Smt. Nirmala Bhattacharya (hereafter Nirmala) and Sri Balaram Bhattacharya

(hereafter Balaram); that Nirmala and Balaram were appointed as joint executors; that the testatrix passed away on January 19, 1991; that

Balaram too passed away on December 24, 1992; that the legal heirs of Balaram in the year 2000 instituted the said case for grant of letters of

administration impleading Nirmala as opposite party and two others, viz. Smt. Sabitri Debi (hereafter Sabitri) and Smt. Lakshmi Debi (hereafter

Lakshmi), as proforma opposite parties; that Nirmala upon receipt of summons entered appearance but subsequently passed away; that prior

thereto, Nirmala had executed a will on June 7, 2004 whereby she bequeath her undivided half share in the said property in favour of the opposite

parties 1 to 4 herein and appointed them as joint executors; that the opposite parties 1 to 4 herein were the legal representatives of Nirmala and

she being an opposite party in the said case, the presence of the opposite parties 1 to 4 herein, who are stepping in her shoes, is necessary for

proper adjudication of the said case.

3. It has been ascertained in course of hearing that while Balaram was the son and Sabitri and Lakshmi are the two daughters of the testatrix,

Nirmala was the widow of Kanailal (since deceased), another son of the testatrix.

4. Mr. Banerjee, learned advocate representing the Petitioners contended that the said case being one relatable to the will executed by the testatrix

and not the will allegedly executed by Nirmala, the opposite parties 1 to 4 herein claiming to be the beneficiaries there under cannot have any locus

stand to intervene and the learned Judge committed gross jurisdictional error in allowing the said application. According to him, the opposite

parties 1 to 4 herein are none else but strangers who have been successful in their attempt to intervene in the said case to delay adjudication thereof

and to use it as a shield against their eviction in accordance with law. It was further submitted by him that no copy of the alleged will executed by

Nirmala was produced and there is reason to believe that Nirmala having passed away on January 8, 2004, she could not have executed any will

on June 7, 2004, as claimed by the opposite parties 1 to 4 herein.

5. Mr. Banerjee further contended that Section 213 of the Indian Succession Act (hereafter the Act) is a bar to the establishment of any right under

a will by an executor or legatee unless probate or letters of administration has been obtained. By placing reliance on the decision of the Supreme

Court reported in Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini

Bose and Others, it was urged that the opposite parties 1 to 4 herein not having pleaded and proved that probate of the will allegedly executed by

Nirmala has been granted, no right could be established on the basis of that will and they cannot derive any advantage there under.

6. He, accordingly, prayed for an order to set aside the order impugned and for expeditious disposal of the said case having regard to the lapse of

time since institution thereof.

7. Per contra, Mr. Biswas, learned advocate for the opposite parties 1 to 4 contended that the learned Judge was perfectly justified in allowing

them to intervene in the said case. According to him, in terms of Section 213 of the Act, an executor derives right from the will and not the

probate; consequently right of audience exists and hence is protected. In support of his submissions, he relied on the decision of a learned Judge of

this Court reported in (2004) 2 WBLR (Cal) 470 (Parimal Kr. Das and Ors. v. Prasun Kr. Das) wherein the expression ""claiming to have interest

in the estate of the deceased"" appearing in Section 283(1)(c) of the Act was construed to include persons having possibility of an interest which is

such as is or is likely to have been prejudicially or adversely affected by the grant and such person would accordingly be entitled to receive citation.

8. He also referred to the decision of the Supreme Court reported in : (2003) 9 SCC 624 (Kedar Lal v. Babul Lal Vyas and Ors.) wherein an

application for substitution was allowed, leaving the question of validity and genuineness of the will open. It was argued that this Court may, without

disturbing the impugned order, similarly observe that the question of validity and genuineness of the will executed by Nirmala is left open to be

decided in appropriate proceedings, and thereby dispose of this application.

9. I have heard learned advocates for the parties and considered the decisions that have been cited at the bar.

10. The legatees in respect of the will executed by the testatrix, being Nirmala and Balaram, are no more. If the will of the testatrix had been

probated during their lifetime, they would have been entitled to half-share in the said property. In the said application being Annexure "A" hereto,

the opposite parties 1 to 4 do not claim to be the surviving heirs of Nirmala; on the contrary, they claim to be her legal representatives. There is no

averment therein that probate of the will allegedly executed by Nirmala has been granted or letters of administration in respect thereof obtained by

the opposite parties 1 to 4. Question that arises in the circumstances for consideration in the light of the decision in Mrs. Hem Nolini Judah (supra)

is whether the opposite parties 1 to 4 can at all claim any interest to intervene in the said case without proof of grant of probate of the will allegedly

executed by Nirmala or having obtained letters of administration in respect thereof.

11. In Hem Nolini (supra), one of the contentions urged on behalf of the Appellant before the Supreme Court was that the High Court was not

right in holding that it was necessary to obtain probate or letters of administration of the will executed by Dr. Miss Mitter in favour of Mrs. Mitter

and that as neither probate nor letters of administration of that will were obtained it was not open to the Appellant in view of Section 213 of the

Act to take advantage of that will. The contention was answered in the following words:

The words of Section 213 are not restricted only to those cases where the claim is made by a person directly claiming as a legatee. The section

does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the will under which

he claims. What it says is that no right as an executor or legatee can be established in any Court of justice, unless probate or letters of

administration have been obtained of the will under which the right is claimed and therefore it is immaterial who wishes to establish the right as a

legatee or an executor. Whosoever wishes to establish that right whether it be a legatee or an executor himself or somebody else who might find it

necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so

unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration.Therefore,

as soon as the Appellant wanted to establish that Mrs. Mitter was the legatee of Dr. Miss Mitter and was therefore entitled to the whole house she

could only do so if the will of Dr. Miss Mitter in favour of Mrs. Mitter had resulted in the grant of probate or letters of administration. Admittedly

that did not happen and therefore Section 213(1) would be a bar to the Appellant showing that her mother was the full owner of the property by

virtue of the will made in her favour by Dr. Miss Mitter. The difference between a right claimed as a legatee under a will and a right which might

arise otherwise is clear in this very case. The right under the will which was claimed was that Mrs. Mitter became the owner of the entire house. Of

course, without the will Mrs. Mitter was an equal heir with her daughters of the property left by Dr. Miss Mitter, as the latter would be taken to

have died intestate, and would thus be entitled to one-fourth. It will be seen from the judgment of the High Court that it has held that the Appellant

is entitled to the one-fourth share to which Mrs. Mitter was entitled as an heir to Dr. Miss Mitter and granted the Plaintiff-Respondent a declaration

with respect to only half the house. Therefore the High Court was right in holding that Section 213 would bar the Appellant from establishing the

right of her mother as a legatee from Dr. Miss Mitter as no probate or letters of administration had been obtained of the alleged will of Dr. Miss

Mitter in favour of Mrs. Mitter. The contention of the Appellant on this head must therefore fail.

(underlining for emphasis by me)

12. The decision in Hem Nolini (supra) was noticed by the Supreme Court in a decision of more or less recent origin, reported in Binapani Kar

Chowdhury Vs. Sri Satyabrata Basu and Another, It was held therein as follows:

5. Therefore, where the right of either an executor or a legatee under a Will is in issue, such right can be established only where probate (where an

executor has been appointed under the Will) or letters of administration (where no executor is appointed under a Will) have been granted by a

competent court. Section 213 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming

under a Will. Section 213, however, bars a decree or final order being made in such suit or action which involves a claim as an executor or a

legatee, in the absence of a Probate or Letters of Administration in regard to such a will. Where the testator had himself filed a suit (seeking a

declaration and consequential relief"s) and he dies during the pendency of the suit, the executor or legatee under his will, can come on record as

the legal representative of the deceased Plaintiff under Order 22, Rule 3,Code of Civil Procedure and prosecute the suit. Section 213 does not

come in the way of an executor or legatee being so substituted in place of deceased Plaintiff, even though at the stage of such substitution, probate

or letters of administration has not been granted by a competent court.

(underlining for emphasis by me)

13. That Section 213 of the Act operates as a bar to claiming of any right under the will of Nirmala by the opposite parties 1 to 4 since no probate

or letters of administration in respect thereof was obtained does not appear to have exercised the consideration of the learned Judge, who appears

to have written a rather cryptic order expressing an ipse dixit that the presence of the opposite parties 1 to 4, who have stepped in the shoes of

Nirmala, is necessary for adjudication of the said case. There was absolutely no ground on which the opposite parties 1 to 4 could have validly

urged the learned Judge to allow them to intervene.

14. In Parimal Kr. Das (supra), the Court was considering a different issue altogether. Section 213 of the Act did not at all come up for

consideration. The decision in Kedar Lal (supra) does not lay down any law that would operate as a binding precedent.

15. I hold that the learned Judge acted contrary to settled principles of law and acted beyond the bounds of his authority in passing the impugned

order warranting interference under Article 227 of the Constitution.

16. Accordingly, I set aside the order impugned and allow the revisional application. There shall, however, be no order as to costs.

17. Having regard to the fact that more than a decade has passed since institution of the said case, the learned District Judge is requested to

proceed with utmost expedition. Subject to his convenience and without being too lenient in the matter of grant of adjournments, it would be

desirable if efforts are made to decide the said case within a year from date of receipt of a copy of this order.

18. Urgent photostat certified copy of this judgment and order may be made available to the applicant as early as possible, subject to compliance

with all formalities.