

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Nov-07-2014

Judge : Arijit Banerjee

Appellant : Appellant

Respondent : Respondent

Judgement :

In The High Court At Calcutta Testamentary and Intestate Jurisdiction Original Side GA2018of 2013 PLA88of 1976 In the goods of: Subodh Gopal Bose And In the matter of Dipak Kumar Sarkar And Alope Sen and ORS.Present : The Honble Justice Mr.Arijit Banerjee For the Applicant : Mr.Nirmalya Dasgupta, Adv.Mr.Somenath Bose, Adv.For the Respondent No.4 : Mr.R.L.Mitra, Adv.Ms.Priyanka Dhar, Adv.Heard On : 21st August and 25th August, 2014 CAV On : 9th September, 2014 Judgment On : 07/11/2014 Arijit Banerjee, J.

(1) One Subodh Gopal Bose, was the owner of substantial properties, both movable and immovable.

He died on August 1, 1975 after having made and published his last Will and Testament dated July 8, 1975 leaving behind as his only legal heiRs.his wife Kamala Bose and four daughters namely Durgarani Sen, Gita Dutta, Bharati Das and Krishna Sarkar, who are the beneficiaries under the said Will and Testament.

Kamala Bose expired in 1977.

Gita Dutta expired in June, 2012 and the present petition has been filed by Dipak Sarkar in his capacity as the executor of the Will and Testament dated 28th April, 2012 made and published by Gita Dutta.

Application for grant of probate of the said Will of Gita Dutta is still pending.

(2) By his said Will, Subodh Gopal Bose (hereinafter referred to as Subodh) appointed his nephew Ashok Kumar Bose and his grandson Alope Kumar Sen (son of Durgarani Sen) as the joint executors and trustees of the said Will.

Probate of the said Will was granted by this Court on July 21, 1976 in Probate Case No.88 of 1976.

(3) The properties left behind by Subodh included diverse immovable properties situate in and outside Calcutta as mentioned in paragraph 9 of the petition.

(4) After grant of probate of Subodhs Will, the joint executors started managing and administering Subodhs estate.

One of the joint executor namely Ashok Kumar Bose, died on February 25, 1990 and the surviving executor Alope Kumar Sen continued to manage and administer Subodhs estate.

(5) On an application filed in Probate Case No.88 of 1976 by one of Subodhs daughter namely Bharati Das, by an interim order dated July 8, 1991 Mr.S.P.Sarkar, Advocate was appointed administrator over the estate of Subodh and the surviving executor, Alope Sen was restrained from further acting as executor to Subodhs estate.

On the said application, by an order dated 17th November, 1992, Mr.Partha Behari Mukherjee, Bar-at-law and Mr.S.P.Sarkar, Advocate were appointed as joint administrators to Subodhs estate.

Alope Sen preferred an appeal from the said order.

The Appellate Court stayed the operation of the said order by an order dated February 3, 1993 and formed a committee of management consisting of Mr.Nirmal

Mitra, Bar-at-Law, as chairman and Mr. Deepak Deb, Bar-at-law, Nirmalendu Das (husband of Bharati Das) and Alope Sen as members of the said committee for administration and management of Subodhs estate.

Bharati filed a special leave petition before the Honble Supreme Court of India but the same was dismissed.

(6) After disposal of the special leave petition, the committee of management took over management and administration of Subodhs estate.

Finally, a petition for compromise between the parties was filed and by an order dated July 29, 1997 this Court appointed Alope Sen and Nirmalendu Das as joint receivers over the estate of Subodh, superseding the said committee of management.

It is the case of the petitioner that the said joint receivers committed various illegal and irregular acts in connection with the administration and management of the said estate for their personal benefits and to defraud and deprive the legatees under Subodhs Will including Gita Dutta, since deceased, whose estate the petitioner represents.

(7) Subodh was a tenant in respect of a parcel of land measuring about 23 Cottahs situate at 91/1A, Raj Sekhar Bose Sarani, Calcutta-700025 which tenancy right after Subodhs death vested in his estate.

It is contended that the joint receivers without the knowledge or consent of Gita Dutta surrendered the said tenancy right for valuable consideration which was paid by post dated cheques and kept in the custody of the joint receivers to be disbursed from time to time as agreed by and between the joint receivers and the owners of the said land.

The total consideration for surrender of the said tenancy was Rs.40 lakhs out of which a sum of Rs.16.2 lakhs was paid to the legatees and estate of Subodh through joint receivers. The balance amount of Rs.23.8 lakhs was to be paid by the owners to the legatees for which post dated cheques were issued and kept with the joint receivers and as a security for encashment of the post dated

cheques it was agreed that one flat measuring 1500 sq.

ft.

to be constructed at the said location will remain charged.

The said joint receivers without the knowledge or consent of Gita Dutta handed over the postdated cheques to the owners allegedly for revalidation but did not get the cheques revalidated.

In fact, they surrendered the cheques.

(8) On or about January 21, 2010, Nirmalendu Das, one of the joint receivers died.

Thereupon, an application was filed by Alok Sen praying for leave to operate bank accounts singly and to disburse the expenses for day to day running of the estate and also to file the accounts of the estate.

By an order dated 25th March, 2010, this Court appointed Alok Sen as the sole receiver.

In November, 2011 Bharati Das filed an application being GA No.3232 of 2011 praying, inter alia, for discharge of Alok Sen as receiver.

By an order dated 17th November, 2011, passed on the said application, Alok Sen was discharged from acting as receiver any further over the estate of Subodh and the Ld.

Advocates on record of the parties were appointed as joint receivers.(9) It was only after the new joint receivers took over administration and convened meetings, it transpired that huge amounts have been paid on account of electricity bills in respect of premises No.5/2 Rammoy Road which is a part of Subodh's estate and wherein Bharati and Alok reside.

Between 1997 and 2009 a total amount of Rs.13.5 lakhs was paid on account of such electricity bills.

(10) For the period between 20th April 2001 and 6th December, 2008 a total sum of Rs.5,26,815/- was taken as loan by Alok from Subodhs estate without the knowledge and notice of the other legatees as admitted by Alok in the minutes of the meeting dated 19th February, 2011 (Annexure L to the petition).(11) Accounts in respect of Subodhs estate have been filed only till 31st December, 2009 and not thereafter, and it is alleged that such accounts were not filed by Alok to suppress misappropriation of funds.

Provident Fund liabilities have also not been paid by Alok and the sum is to the extent of approximately Rs.8 lakhs.

On account of security guards posted at Premises No.5/2 Rammoy Road an average sum of Rs.5,000/- per month is being paid.

(12) It is further alleged that Alok has misappropriated at least a sum of Rs.14,18,669/- as per particulars mentioned in the paragraph 57 of the petition and he should forthwith compensate the estate on that account.

A prayer has been made for sale of the properties of the estate including Premises No.14B Madan Paul Lane, Calcutta.

(13) When this application was moved on 15th July, 2013 upon notice to the respondents, nobody appeared for Aloke Sen being the respondent No.1.

Patherya, J.

passed an order, inter alia, directing the respondent No.1 to make payment of the sum Rs.5,26,815/- within a week from the date of receipt of that order.

By a subsequent order dated 24th July, 2013, when Ld.

Counsel for the respondent No.1 appeared, Patherya, J.

extended the time to make payment by the respondent No.1 by a week with the direction that on receipt of said sum the same was to be credited to the sums payable to the Regional Provident Fund Commissioner.

Direction was given for sale of Premises No.14B Madan Pal Lane, Calcutta either by public auction or by private treaty subject to confirmation by this Court.

It was further directed that the accounts of the estate should be reflected in the opposition to be filed by the respondents.

(14) By a further order dated 4th September, 2013, Patherya, J.

extended the time to file affidavit-in-opposition on the prayer of Ld.

Counsel for Bharati Das and Alope Sen.

Further the time to furnish the account was extended by a week.

Alope Sen was also directed to submit a report with regard to the surrender of tenancy at Premises No.91/1A Raj Sekhar Sarani, Calcutta-700025.

The joint receivers were directed to take steps for sale of Premises No.14B Madan Pal Lane, Calcutta by publishing advertisement once in The Statement, English edition and once in Pratidin and to consider the offers received.

(15) It appears that an application was made by Alope Sen for modification of the order dated 15th July, 2013 passed by Patherya, J. The said application was, however, dismissed.

(16) On 13th August, 2014 when the application came up before me, Ld.

Advocate appeared for the respondent No.1 and stated that she had taken a change from erstwhile Advocate on record of the respondent No.1 and had filed her Vakalatnama only a week earlier as such she prayed for adjournment of hearing.

Ld.

Counsel appearing for the other legatees stated that the respondent No.1 is in the habit of changing his Advocate on record frequently.

However, for the ends of justice, the matter was adjourned till 20th August, 2014 upon payment of cost assessed as 300 gMs. which cost, however, was never paid.

(17) The matter was finally taken up for hearing on 21st August, 2014 when Ld.

Advocate Mr. Kuldeep Mallick appearing for the respondent No.1.

(18) On 25th August, 2014, Ld.

Counsel for the petitioner concluded his submission and the matter was adjourned till 29th August, 2014, for the Ld.

Advocate for the respondent No.1 to make his submission.

(19) On 29th August, 2014, Mr. Kuldeep Mallick, Ld.

Counsel, appearing for the respondent No.1 submitted that due to peculiar developments that have taken place subsequent to the last date of hearing, it was not possible for him or his Advocate on record to continue to represent the respondent No.1.

Accordingly he on his own behalf and on behalf of his Ld.

Advocate on record prayed for leave to retire.

Such leave was granted.

Ld.

Counsel for the petitioner submitted that everyday the respondent No.1 was siphoning off funds and/or dealing with the assets of the estate.

He submitted that this would be the third occasion that the respondent No.1 will be taking change of Advocate.

This was nothing but a ploy on behalf of the respondent No.1 to delay the matter so that in the meantime he could carry on with his mischief unabated.

Since I was in the middle of hearing out the application finally, I adjourned the matter till 4th September, 2014 and directed the petitioners Ld.

Advocate to communicate the gist of that days order to the respondent No.1 to give the respondent No.1 an opportunity to be represented.

It was made clear in my said order that no further adjournment would be granted on the next date.

(20) On 9th September, 2014 when the application was next taken up for hearing it appeared from the tracking record of Indian Post produced by the petitioner that the delivery of notice to the respondent No.1 had failed because of locked door, on two occasions.

It was obvious that the respondent No.1 was avoiding Court and I, thus, concluded hearing of the application.

(21) When Mr.Kuldeep Mallick had initially appeared for the respondent No.1 he had raised a preliminary objection to the maintainability of the present application relying on Section 213 (1) of the Indian Succession Act, 1925 which is extracted hereunder:No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with the copy of an authenticated copy of the will annexed. (22) Mr.Mallick submitted that the present petitioner has made this application in his capacity is executor of the last Will and Testament of Gita Dutta.

However, no Court of competent jurisdiction has granted probate of such Will as yet although application for such probate may be pending.

As such, the present petitioner cannot exercise any right as executor of the Will of late Gita Dutta.

(23) Mr.Nirmalya Dasgupta, Ld.

Counsel for the petitioner answered the preliminary point by drawing this Courts attention to Sections 211(1).305 and 307(1) of the Indian Succession Act, 1925

which are extracted hereunder:211(1).The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

307(1).Subject to the provisions of Sub-section (2).an executor or administrator has power to dispose of the property of the deceased vested in him under Section 211, either wholly or in part, in such manner as he may think fit. (24) Mr.Dasgupta has also relied on the following decisions:(i) Bali Ram Dhote-vs.-Bhupendra Nath Banerjee: AIR1978 Cal 559.

(ii) Ajit Kumar Hazra-vs.-Rathindra Nath Roy: AIR1980 Cal 117.

(iii) Mohanlal Dungarmal Futnani-vs.-Vishanji Dungarmal Futnani: AIR2001 Cal 122.

(D.B.) (iv) Ramniklal Amritlal Shah-vs.-Bhupendra Impex PVT.Ltd.: AIR2001 Bombay 224.

(v) Commissioner, Jalandhar Division-vs.-Mohan Krishna Abrol: (2004) 7 SCC505

(vi) FGP Ltd.-vs.-Saleh Hooseini Doctor: (2009) 10 SCC223 (25) I have not discussed the decisions cited separately, as they all are authorities for the same proposition that it is Section 211 and not Section 213 of the Indian Succession Act that deals with the vesting of property of the deceased in the executor.

This vesting does not take place as a result of probate.

On the executor accepting his office, the property vests in him and the executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate.

The grant of probate does not give title to the executor.

It just makes his title certain.

Under Section 213 of the Indian Succession Act, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the Will.

The vesting of right is enough for the executor to represent the estate in a legal proceeding.

The right of action in respect of personal property of the testator vests in the executor on the death of the testator.

Sections 211 and 213 of the said Act have different areas of operation.

Even if the Will is not probated that does not prevent the vesting of the property of the deceased in the executor and consequently, any right of action to represent the estate of the executor can be initiated even before the grant of probate.

(26) In view of the aforesaid, I have no doubt in my mind that the present application is maintainable by the executor of the Will of late Gita Dutta although such Will has not yet been probated.

As I have noted above on 29th August, 2014, the respondent No.1 withdrew his lawyers from the case and they were granted leave to retire.

By doing so, the respondent No.1 evinced his clear intention of not contesting the present application.

Although the respondent No.1 has filed an affidavit-on-opposition, nobody appeared on his behalf to place the said affidavit-in-opposition.

In my view, the duty of a litigant does not end by filing pleadings only.

Either the litigant himself in person or an authorized lawyer is required to place such pleading before the Court and make submission in support of such pleading.

The court is not obliged to go through such pleadings on its own.

When nobody appears on behalf of an applicant to place the application, the Court normally dismisses the application for default.

Similarly, in my view, when a respondent files an affidavit-in-opposition but at the time of hearing nobody appears on his behalf nor he appears in person to place such affidavit-in-opposition before the Court, the Court will normally ignore such affidavit-in-opposition.

It is not possible for the Court to go through such affidavit thread bare and find out what the case of the respondent is.

(27) In the present case, after the Counsel of the respondent No.1 withdrew from the matter, notice was sought to be served as per the Courts direction on the respondent No.1 to enable him to brief other Counsel or to present his case in person.

However, in spite of notice nobody appeared to present the case of the respondent No.1.

Hence, the Court would have been perfectly justified in proceeding with the matter as if no affidavit-in-opposition has been filed by the respondent No.1.

(28) In fact, however, it appears that the respondent No.1 has filed an affidavit-in-opposition.

The original affidavit is not in the records of the Court as it was submitted that the same has been misplaced.

Accordingly, by an order dated 21st August, 2014 this Court took on record a copy of the affidavit-in-opposition till the original was found out.

The original of the affidavit was however, never traced and/or filed before this Court.

I have perused a copy of such affidavit-in- opposition although in my opinion I was not required to do so since nobody represented the respondent No.1 to answer the case of the petitioner.

On such perusal I do not find satisfactory answer to the allegations made against the respondent No.1 in the petition.

(29) An order has already been passed by Patherya, J.

on 15th July, 2013 in terms of Prayers (a) and (b) of the petition and the same are confirmed.

An order has already been passed in terms of Prayer (k) of the petition by Patherya, J.

on 24th July, 2013 and the same is hereby confirmed.

(30) From the pleadings on record I am satisfied that the respondent No.1 has mismanaged the affairs of the estate of Subodh Gopal Bose to the prejudice of the other beneficiaries of the estate of Subodh Gopal Bose and for the personal benefit of the respondent No.1.

Nobody has appeared on behalf of the respondent No.1 to refute the allegations on that score.

Accordingly, there will also be an order in terms of Prayers (c).(e).(f).(h).(i) and (j) of the petition.

The report to be submitted by the respondent No.1 in terms of Prayer (f) should be within four weeks of service of this order on the respondent No.1 and such report should be submitted to the joint receiveRs.The payment that is to be made by the respondent No.1 in terms of Prayer (c) of the petition should be done within a period of four weeks from the date of service of this order on the respondent No.1.

Although the respondent No.1 and Smt.

Bharati Das may be beneficiaries under the Will of Subodh Gopal Bose, an unusually excessive amount is being spent on account of electricity consumption in respect of premises No.5/2 Rammoy Road, Calcutta700025 where the respondent No.1 and Smt.

Bharati Das reside along with their respective families.

This, according to the Court is not fair and accordingly an order has been passed in terms of Prayer (i) of the petition.

The sale of the property at premises No.14/B Madan Pal Lane, Calcutta-700025 will be subject to confirmation by this Court.

(31) This application, thus, stands disposed of.

(Arijit Banerjee, J.)

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