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Court : Kolkata

Decided On : Jul-18-2011

Judge : Dipankar Datta, J.

Acts : Code of Civil Procedure (CPC) - Section 151; Constitution Of India - Article 227; Indian Succession Act, 1925 - Section 276; Evidence Act - Section 68; Succession Act - Section 63

Appeal No. : C.O. 2114 of 2011

Appellant : Ashok Kumar Nag and Another

Respondent : Narayan Kumar Roy

Advocate for Def. : Mr. Jahar Chakraborty, Adv

Advocate for Pet/Ap. : Mr. A.B. Routh; Mr. A.K. Choudhury, Adv

Judgement :

1. Challenge in this revisional application under Article 227 of the Constitution is to order no.51 dated May 18, 2011 passed by the learned Judge, 10th Bench, City Civil Court at Calcutta in O.C. Suit No.11/2007. By the impugned order, the learned Judge rejected a petition filed under Section 151 of the Code of Civil Procedure by the petitioners, being the defendants in the suit, seeking recall of order no.50 dated April 19, 2011. The said order proceeded to allow a petition filed by the plaintiff/opposite party ex parte with the observation that “I find no legal bar

to make the will in question exhibited as sought for".

2. One Haran Chandra Nag (hereafter the deceased) executed a will dated February 20, 1993. He died on January 19, 1995 a bachelor, leaving behind him his two nephews, the petitioners, as his heirs. The opposite party, the executor of the will, thereafter filed an application under Section 276 of the Indian Succession Act, 1925 for grant of probate. The petitioners opposed the application contending, inter alia, that the opposite party had no locus standi to pray for grant of probate since the alleged will was not executed by the deceased and hence question of he being appointed executor does not arise. It was further contended that the alleged will was a forged document and the application had been filed to cheat and/or deprive the petitioners, upon whom the entire properties of the deceased had devolved by operation of law. The probate proceedings thus became contentious.

3. Before the learned Judge, the witnesses on behalf of the opposite party testified in due course of time. The witnesses included, inter alia, one of the attesting witnesses, the advocate who drafted the will and the opposite party himself. On or about September 21, 2010, the opposite party filed an application under Order XVIII Rule 17 of the Code. It was averred therein that "due to bonafide mistake, the last will and testament of Haran Chandra Nag was not exhibited" and, accordingly, a prayer was made to recall Dr. Satyabrata Mukherjee, one of the attesting witnesses (PW 2), to prove the will. However, on February 2, 2011, the said application was rejected as not pressed. Immediately thereafter, the opposite party filed an application praying for an order for marking and exhibiting the will dated February 20, 1993. It was contended therein that PW 2 in course of examination-in-chief had "identified the WILL including his signature and the signature was marked as Exhibit-15/1". In cross-examination, it was the testimony of PW 2 that he was present at the time of execution of the will and that "Haran Babu put his signature in the WILL in my presence". Reference was also made to the testimony of PW 3, Mr. Premangshu Chatterjee, the draftsman of the will, who testified that "Haran Chandra Nag put his signature both in Bengali and in English in the WILL in my presence and in the presence of the other witnesses".

4. The petitioners filed an objection to such application. It was their specific case that the said application is misconceived and not maintainable in law. They contended that there was no provision in the Evidence Act, 1872 entitling a party to the lis to pray for an order for marking an unexhibited document as an exhibit in the absence of proper, cogent and corroborative evidence. It was further contended that in the absence of specific evidence proving the will, the same cannot be exhibited.

5. In due course of time, the Presiding Officer of the 10th Bench retired.

The case record along with the application filed by the opposite party was placed before the learned Judge-in-charge of the 10th Bench on March 15, 2011. However, since the Judge-in-charge was busy with his own files, hearing of the application was adjourned till April 1, 2011. On that day too, hearing could not progress since the Judge-in-charge was again busy with his own files and April 5, 2011 was fixed as the next date. On April 5, 2011 too, hearing was adjourned till April 19, 2011 owing to the same reason for which hearing had been adjourned previously.

6. On April 19, 2011, the learned advocate for the petitioners, it is alleged, was present in the Court of the learned Judge-in-charge upto 2.30 p.m. but the application had not been taken up for hearing. He had been to another Court for attending some urgent case carrying an impression that the application would not be heard for want of time. At about 3.30 p.m., he visited the Court of the learned Judge-in-charge to attend another matter that was called on when he came to learn that the said application had been allowed ex parte. Considering the evidence of P.W. 2 in particular, the learned Judge passed an order directing that the will in question be marked as Ext.15 and fixed May 18, 2011 for evidence of the petitioners.

7. The aforesaid ex parte order led to filing of an application for recall and to fix up a date of hearing of the application of the opposite party on merits. The reasons why the petitioners could not be represented before the learned Judge-in-charge on April 19, 2011 were assigned and it was submitted that unless the order is recalled, the petitioners would suffer irreparable loss and injury.

8. The opposite party did not file any written objection to the application for recall but opposed the same while it was heard on May 18, 2011 leading to its ultimate rejection, as noticed above.

9. Mr. Routh, learned advocate appearing for the petitioners, contended that the signature of the deceased in the will had not been identified and no evidence to this effect having been led on behalf of the propounder of the will, whose obligation it is to prove it, the learned Judge ought not to have marked the will in question as an exhibit without granting opportunity of hearing to the petitioners. He referred to the evidence of P.W.2 in course of cross-examination on August 27, 2010 wherein he testified that the deceased had put his signature in the will in Bengali. At the same time, he referred to the will from which it is evident that the deceased had signed it both in Bengali as well as in English which, according to him, creates genuine doubt about the authenticity of the will.

10. Drawing attention to the application under Order XVIII Rule 17 of the Code, it was further contended that the signature in the will of the deceased had not been identified and therefore was rightly not marked as exhibit, prompting the opposite party to file it. He submitted that the learned Judge failed to consider the effect of rejection of the said application for recall of P.W.2.

11. He next referred to Section 68 of the Evidence Act and Section 63 of the Succession Act and submitted that the combined effect of the said provisions was not taken into consideration by the learned Judge. The decision reported in AIR 1990 MP 334 (Illyas & ors. v. Badshah, alias Kamla) was referred to in support of the proposition that at least one attesting witness ought to speak about the testator’s signature and that none of the attesting witnesses had proved that the signatures appearing on the will were that of the deceased; hence, prohibition of Section 68 of the Evidence Act disentitled the Court to take the will into consideration.

12. Referring to the order under challenge dated May 18, 2011, he submitted that the learned Judge committed gross error in making the observations he made without appreciating the settled principle of law that a document marked as an exhibit without objection would debar the petitioners from raising objection at the

time of advancing arguments. Reliance in this connection was placed on the decision reported in AIR 1972 SC 608 (P.C. Purushothama Reddiar v. S. Perumal).

13. He, accordingly, prayed for setting aside of the impugned order.

14. The application was opposed by Mr. Chakraborty, learned advocate for the opposite party. He first contended that in the absence of any challenge to the order dated April 19, 2011, this application is not maintainable. It was next submitted by him that the learned Judge had directed marking of the will as an exhibit after considering the entire evidence on record and, therefore, no illegality had been committed. He referred to the evidence of P.W.3 who had testified that the deceased had signed the will in his presence, both in Bengali as well as in English. The submission advanced on behalf of the petitioners that the will is a forged and manufactured document, according to him, has been raised in despair. In any event, he submitted, that the observations of the learned Judge in the penultimate paragraph of the impugned order would sufficiently take care of the grievance of the petitioners and, therefore, no interference was warranted.

15. I have heard learned advocates for the parties and perused the evidence of the witnesses on behalf of the opposite party that has been led in course of trial.

16. The submission of Mr. Chakraborty that the order dated April 19, 2011 had not been challenged by the petitioners before any superior forum and, therefore, its propriety cannot be examined has failed to impress me. In an appropriate case, the Court exercising power under Article 227 of the Constitution may interfere suo motu if the subordinate Court is found to have acted beyond the bounds of its authority. The power of judicial superintendence is exercised to do justice between the parties and not to render justice a casualty. Absence of challenge to the order dated April 19, 2011 would not be a bar for me to decide, if the situation so warrants, whether the learned Judge was justified in passing the same.

17. However, bearing in mind the extant provisions of law vis-à-vis the decision of the Supreme Court cited before me, I am of the considered view that this application may be disposed of by a clarification of the order under challenge.

18. The application under Section 151 filed by the petitioners seeking recall of the order dated April 19, 2011 was disposed of with the observation “that the question raised on behalf of the defendants today will be appreciated at the time of final disposal of the suit”. It is settled law that a party to the lis having consented to a document being marked as an exhibit, he loses his right to reopen the question. The law laid down in P.C. Purushothama Reddiar (supra) to the effect that it is not open to a party to object to the admissibility of documents which are marked as exhibits without any objection from his side, might act as a fetter for the trial Court to consider the objection that had been raised by the petitioners since no objection on their part has been recorded while marking the disputed will as an exhibit either by the order dated April 19, 2011 or by the impugned order May 18, 2011. Having regard to the fact that the petitioners were opposing the application of the opposite party tooth and nail, absence of their learned advocate on only one occasion ought not to have viewed too seriously and the ex parte order dated April 19, 2011 made, thereby granting the application of the opposite party particularly when on three previous occasions the learned Judge-in-charge could not deal with the application due to paucity of time. What was necessary, on facts and in the circumstances, was that the will in question ought to have been marked as an exhibit in the presence of the parties so that the petitioners could have had an opportunity to object to the marking of the will. The question of judicial determination of the matter as to whether the disputed will had been executed by the deceased or not would arise provided objection is taken in respect of the will that was tendered in evidence and before it was marked as an exhibit in the suit.

19. Considering the facts and circumstances, I of the clear view that this application merits disposal with a request to the learned Judge of the trial Court to make an endorsement on the will to read “objected, allowed subject to objection”. This endorsement would ensure that the right of the petitioners to object remains open and can be judicially determined at the appropriate stage.

20. Accordingly, this application stands disposed of.

21. There shall be no order as to costs.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.

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