

**(2014) 08 CAL CK 0101**  
**In the Calcutta High Court**

**Case No :** G.A. No. 2705 of 2013 and P.L.A. No. 292 of 2012

Jibendra Nath Biswas

APPELLANT

Vs

Swadesh Ghosh

RESPONDENT

**Date of Decision :** 11-08-2014

**Acts Referred:**

Succession Act, 1925 — Section 263, 283(1)(b), 283(1)(c)

**Citation :** (2014) 4 CALLT 178

**Hon'ble Judges :** I.P. Mukerji, J

**Bench :** Single Bench

**Advocate :** S.K. Kapoor, Ranjan Bachawat, Sr. Advs., Suman Dutt, Sukrit Mukherjee, Soumabho Ghose, Debraj Mukherjee and Saudull Abedin, Advocate for the Appellant; Ahin Chowdhury, Gopal Pahari, and Arif Ali, Sr. Advs, Advocate for the Respondent

## **Judgement**

I.P. Mukerji, J.—Fact and Arguments--One Jibendra Nath Biswas obtained lease from the Government of West Bengal, on 30th March, 1997, a parcel of land comprising of 6.3522 cottahs, which was demarcated and described as plot No. 7 in Block-BA, Sector-1, of Bidhannagar in Salt Lake City, extension area District-24 Parganas(s), P.S. Salt Lake. The lease was for 999 years. Jibendra Nath died on 5th November, 1991. Whether he died intestate or testate is the question to be ultimately answered. At the time of his death, he left behind Kuhu Biswas, his widow and two sons Dipta and Soumya, as his natural heirs. They are impleaded as the fifth to seventh respondents in this proceeding.

2. At least these three persons believed that Jibendra Nath had died intestate. This is for various reasons. They proposed to apply before the Urban Development Department of the Government of West Bengal to record their names as joint lessees, of the said property as the heirs of Jibendra Nath. In this connection Kuhu Biswas affirmed an affidavit on 14 May, 1996 before the Notary Public Calcutta, where she declared that Jibendra Nath had died intestate and that she and her two sons aged 25 years and 20 years respectively were his only

legal heirs. Similarly, Dipta and Soumya affirmed separate affidavits before the same Notary stating that each of the three of them was entitled to 1/3" of the above property. They said that they were unmarried and were residing with their mother. There was no mention of a will or any other testamentary instrument of their father.

3. On 18th November, 1999 The Bidhannagar Municipality made a communication to the widow and the three sons to the effect that their names had been mutated in their records in place of Jibendra Nath, with effect from 04th October, 1996, in respect of the said property. Therefore, in the records of the Municipality these three persons were recorded as joint lessees of the property.

4. Constructor's House Private Limited, the eighth respondent is a company incorporated under the provisions of the Companies Act, 1956. It has its registered office at 20A, Mahendra Sreemani Street, Kolkata-700 009.

5. On 26th April, 1999 these three heirs of Jibendra Nath, who are impleaded in this application as the fifth, sixth and seventh respondents gave possession of this property to this company as a lessee. A tenancy agreement was entered into on 26th April, 1999 between this company and the fifth, sixth and seventh respondents. According to the agreement a sum of Rs. 30 lakhs was paid by the company to these three persons as security deposit.

6. A Arup Chatterjee, was the Joint Managing Director of the company. On 26th April, 1999 a general power of attorney was executed by these three heirs of Jibendra Nath in favour of Arup Chatterjee, giving him power in respect of the whole property. Two other documents were executed by the fifth, sixth and seventh respondents in favour of this company Constructor's House, namely an affidavit of declaration dated 26th April, 1999 and an agreement to assign the head lease of these respondents.

7. In this declaration also the three heirs of Jibendra Nath declared that he had died intestate. A similar declaration was made in the agreement to assign. The said company was put into exclusive possession.

8. The next important document is styled as a deed of surrender, cancellation and revocation. It was executed on 2nd June, 2003. The parties to this agreement were the fifth, sixth and seventh respondents of the first part. Constructor's House Private Limited was a party of the other part. The agreement recorded that on 26th April, 1999 a tenancy of the said property was created in favour of the party of the other part and that by the purported agreement for assignment of the same date the lease hold interest of the said respondents was assigned to the said party of the other part. By the present agreement, the earlier agreement of 26th April, 1999 was sought to be cancelled. It was signed by the fifth, sixth and seventh respondents. On behalf of the Constructor's House Private Limited it was signed by a Arup Chatterjee. On the very same day i.e. on 2nd June, 2003, another agreement was executed by

the above respondents. This time it was with the applicant with Constructor's House Private Limited as a confirming party. It was quite a detailed agreement. It enumerated the lease granted by the Government of West Bengal to Jibendra Nath Biswas. It recited Clause 2(7) of that lease which prohibited the landlord to sub-lease the land or building constructed thereon without the permission of the government. It also spoke about a notification dated 4th September, 1985 amending Clause 2(7) to the effect that prior permission of the government would not be necessary to let out such a kind of property for residential purpose. According to the recital Constructor's House Private Limited which was inducted into the property as a tenant had expressed their desire not to continue with the tenancy. Apparently the tenant introduced the applicant, Smt. Lagnajita Saha.

9. According to Mr. S.K. Kapoor, learned Sr. Advocate, the applicant paid Rs. 70 lakhs in exchange for this tenancy. The agreement permitted the applicant to demolish the existing structure and construct a new structure. This tenancy agreement was supplemented by two other agreements also dated 2nd June, 2003, for assignment of the said respondents' lease-hold interest and for permitting the applicant to make construction. This was further bolstered by a power of attorney of the same date. Thereafter construction was made.

10. All these documents ensured that the applicant was firmly put in possession. According to Mr. Kapoor this structure has been constructed by the applicant and was occupying the property. As many as four stories were constructed.

11. From or about 8th February, 2012 the applicant engaged a security agency to provide security services to the property. Two security guards were posted by the name of Kanailal Das and Sukumar Dhara.

12. In or about 2013 a Civil Suit (T.S. No. 204 of 2013) was instituted in the learned Sealdah Court by the first respondent against Kanailal Das and Ors. It appears that in aid of that suit he filed an application under Order 39 of the Code of Civil Procedure for an injunction. The learned Court on 10th July, 2013 passed an order of status quo regarding the property.

13. On perusal of the papers it transpires that the first respondent, describing himself as the legatee of an alleged will and testament dated 4th November, 1991 of Jibendra Nath filed the above suit against the "watch men of the applicant" at the site of the property.

14. Ironically, Jibendra Nath Biswas died the day after executing the purported will.

15. What is most extraordinary is after twenty one years of Jibendra Nath's death an application was made in 2012 in this Court, by the second respondent, as executor for probate of the alleged Will. It was marked PLA 292 of 2012. The said heirs of Jibendra Nath being the fifth, sixth and seventh respondent's signified their consent to the grant of probate. Since they were the only natural heirs of the deceased, their consent was accepted by the registry of this Court.

The requirement of issuing citation was not felt and probate was granted in common form by this Court on 7th January, 2013 in accordance with its procedure. What is very starting is that the second respondent, in accordance with the current practice filed an undertaking to this Court declaring that, apart from the natural heirs of the deceased there was no other person who had any interest in the grant of probate under section 283(1)(b) of the Indian Succession Act, 1925.

16. Now, I will briefly describe the contents of the Will.

17. The will contained a recital about the above heirs of Jibendra Nath. It said "I have made effective provisions of my other residuary properties and estates for my said son and wife". No other details were disclosed. No other reasons for disinheriting them were advanced. Under the Will the said property was bequeathed to the first respondent who was described as a friend, of the testator. It also provided that in the event he predeceased the alleged testator, the property would devolve on his wife Smt. Basanti Ghosh. A complete outsider, a Durgapada Dey of 46/16, S.N. Baneijee Road, Kolkata - 700 014, the second respondent was appointed as the executor. What is remarkable is that in the affidavit of assets filed in connection with the probate proceedings of this Will, the testator was shown to have no assets. Apart from this property cash in the house was shown as nil, cash in bank was shown as nil. He did not even have a single utensil in the house.

18. As I have said earlier, probate of this Will was taken in common form from this Court.

19. Mr. Kapoor, learned senior advocate submitted that the Will was forged. He relied upon the signature of Jibendra Nath in the lease deed and in the Will and submitted that the two signatures were discrepant and that the signature on the Will was forged. He drew my special attention to two parts of the signature, being "DRA" in Jibendra and "Nath", on a magnified view of the signature. According to Mr. Kapoor the signature on the Will appeared to have been fabricated.

20. The last point urged by Mr. Kapoor supplemented by Mr. Suman Dutta was limitation. It was contended that under Article 137 of the Limitation Act, 1963 a maximum period of three years was granted to the executor to apply for probate of the will. Both the executor and beneficiary had knowledge of the will as would appear from the affidavit-in-opposition in this application of Swadesh Ghosh affirmed on November, 2013. The affidavit of Durgapada affirmed on 26th November, 2013 would also show that he was aware of the contents of the Will. Swadesh Ghosh was also aware of the Will as would appear from the affidavit also affirmed on 26th November, 2013.

21. Mr. Ahin Chowdhury, learned senior advocate appearing for the respondents argued many points. His fundamental defence, however, on the question of locus standi of the applicant to maintain this application.

22. He submitted that by his last Will and testament Jibendra Nath had devised and bequeathed the entire property at Salt Lake to the first respondent. The Will had been probated in 2013 in common form in this Court, after taking consent affidavits from the natural heirs of the testator having a caveatable interest. The applicant was a tenant under the heirs of the testator or a party to an agreement for sale, with them. The government had not granted any consent to the fifth, sixth and seventh respondent assign the lease. She has no caveatable interest under section 283(1)(b) the Indian Succession Act, 1925. She could not be cited to come and watch the probate proceedings. The same rule applied in the case of an applicant for revocation of a grant of probate. The present application for revocation of grant of probate was wholly non maintainable and should be dismissed. If the applicant wanted to avail of any remedy she had to do so by filing civil suit or avail of any other civil remedy.

23. There was no fixed period of limitation to file an application for grant of probate, he argued.

24. I will discuss the cases cited by learned counsel for both the parties when I deal with the merits of the respective cases.

25. DISCUSSION AND CONCLUSIONS--It is very important to set out the section of the Indian Succession Act, 1925 which deals with revocation of the grant of probate. It is section 263. It is in the following terms.

"263. Revocation or annulment for just cause - The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation--Just cause shall be deemed to exist where--

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

26. In the goods of: Wajid Ali (Deceased) Shahjad Ahmed Vs. The State Bank Of India, Employees Cooperative Housing Society Ltd., . I had observed:

"Therefore, in our Court it may not be so easy to reopen a probate granted in common form unless it is shown that some misrepresentation or fraud has been practiced upon the Court or that the consent affidavits do not reflect any consent

at all and so on/(See Bharat Kumar Amritlal Sayani and Another Vs. Jayantilal Kalidas Sayani and Others, ).

Once a doubt is created in the mind of the Court that the will which was presented before the Court for probate was not genuine, or that the consent affidavits were fabricated, the Court should at once revoke the grant and ask the executor to prove the will in solemn form. In this case, there is considerable doubt in my mind about the authenticity of the will, and consent affidavits as discussed above."

27. In this case the conduct of the parties is very important in "determining its outcome. As I have narrated earlier, the widow and the two sons of Jibendra Nath Biswas represented to the eighth respondent and thereafter to the applicant that Jibendra Nath had not left behind any Will. His widow and two sons were his only heirs on intestacy. On such representation they obtained mutation of the Salt Lake property in their names. On such representation they induced the eighth respondent to take tenancy of the property. Then, the applicant was also roped in. Several agreements were executed between these parties. In all of them the fifth to seventh respondents represented themselves to be the heirs on intestacy of Jibendra Nath. In good faith the applicant had paid these persons Rs. 70 lacs. There is no dispute that the applicant was let into the premises and allowed to construct a house therein. She has constructed a four storied building.

28. Twenty one years after the death of Jibendra Nath a purported Will executed by him was disclosed. By the Will the Salt Lake property was bequeathed to the first respondent. He started claiming title over the property. The said heirs of Jibendra Nath surreptitiously filed consent affidavits giving consent to the grant of probate of the Will sought by the second respondent as executor of the said Will, in this court.

29. The wife and two sons, who declared to the Municipality at the time of mutation of the property that Jibendra Nath had died intestate and that they were the heirs on intestacy and who had represented to the applicant and the eighth respondent similarly, could not have filed consent affidavits agreeing to the grant of probate in favour of the second respondent. This was acting totally inconsistent with their earlier act. Such consent also had the effect of divesting the property or any interest therein from the applicant. The heirs setting up title in another person, the second respondent, by acknowledging his right as the executor of the will of Jibendra Nath further aggravated the fraud. More complicated became the situation when the first respondent as the legatee, promptly obtained a deed of assent from the executor, acquired an ostensible title over the property, filed the title suit at Sealdah and tried to obtain an order giving him possession.

30. Mr. Chowdhury submits that the applicant should now go to a civil forum and seek redress.

31. The applicant, in my opinion cannot have any redress in the civil forum if the

probate is allowed to remain undisturbed. The executor will have title over the property. He is also the sole legatee. The applicant will have to sue the fifth, sixth and seventh respondents for fraudulently representing to her that they had title over the property. Intricate questions will arise whether the applicant was aware of the will of the deceased and whether his claim was maintainable by the laws of limitation. At best she could obtain a decree that the heirs of Jibendra Nath did not have any title to convey to the applicant and that the sale conveyed no such title to her. After so many years the applicant may not be able to recover Rs. 70 Lakhs she has paid. The first to seventh respondents would remain successful in divesting the applicant of her title or interest in the property after so many years, by one stroke. The most important thing is that if the probate is allowed to stand, the applicant cannot win against the impostor first and second respondent. She can only have a remote chance to win against the fifth to seventh respondents with whom she had transactions so many years ago.

32. The legislature has been cautious in not stipulating the person or classes of persons who could apply for revocation of the grant. It simply provides that a probate may be revoked on a just cause. I tend to believe that this expression in the section provides the Court with a power to suo moto revoke the grant for a just cause, the causes being specified in the explanation to the section under "a to e".

33. The categories of persons entitled to apply for revocation of probate are broader than those entitled to make an application for grant of probate. See the speech of AIR 1944 11 (Privy Council).

34. But, the doors of the Court cannot be thrown open to everybody. That is why the courts have evolved their own rules with regard to such categories of persons. Such persons, it seems should have some interest in the estate of the deceased. The categories of such persons are not closed. *Rajiv Ramprasad Gupta Vs. Rustom Sam Boyce*, cited by Mr. Chowdhury ruled that a tenant had no interest to apply for revocation of a grant. In *Ramani U. Krishnan Vs. Dr. Ammini Praveen Joshua @ Veena*, , also cited by him, it was held that a party to an agreement for sale did not have such a right. This was cited by Mr. Chowdhury emphasising that the applicant was a party to the development agreement which could at best be taken as an agreement for sale. She did not have any higher interest.

35. But these two cases are of doubtful authority for the reasons given by me below. In AIR 1944 11 (Privy Council) the purchaser of an heir of a deceased sought to be deprived of the property by propounding of a Will was held by Lord Atkin to have a right to apply for revocation of grant. His Lordship also held that a person injured by fraud in obtaining probate also had similar rights. Our High Court in *Sm. Annapurna Kumar Vs. Subodh Chandra Kumar*, permitted a person with a "slight interest" to come before the Court. The Madras High Court in *E. Sankaran Vs. Mrs. Krishnaveni and Rajammal*, permitted any person who was affected by the Will to come forward before the Court. *Mokashadayini Dassi* and

Others Vs. Karnadhar Mandal, went to the extent of saying that an applicant need not have had an interest at the time of death of a person but it was enough if he acquired the interest later. The dictum of the Division Bench was pronounced by Sir Asutosh Mookerjee, J.

36. Prima facie, clearly, the first to seventh respondents have practised fraud on the applicant in obtaining probate of the Will of Jibendra Nath Biswas. The applicant is firmly in possession of the subject property by virtue of the Agreement to assign, the construction agreement and the Power of Attorney all dated 2nd June, 2003 and having constructed a four storied building on the property.

37. I hold that the applicant in the above circumstances has sufficient interest to maintain this application.

38. The judgment of the Hon''ble Supreme Court in Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others, followed by the Bombay High Court in Wilma Levert Canuao and Others Vs. Allan Sebastian D'Souza and Another, tend to hold that there is a continuing right of the executor to make an application before the Court for probate. Probate was described as the permission to perform a legal duty. The right to apply would accrue when it became necessary and would not be confined to three years from the death or knowledge of the Will whichever was later. In Krishna Kumar Sharma Vs. Rajesh Kumar Sharma, , the above decision in Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others, was followed. Prima facie, I am of the view that the point of limitation in this case is a mixed question of facts and law which can only be resolved at the trial.

39. I am not going into the question of forgery of the Will which may be resolved at the trial.

40. At any rate on the above facts the probate in favour of Swadesh Kumar Ghosh the first respondents in common form cannot stand (See Wajid Ali (Deceased) Shahjad Ahmed Vs. The State Bank Of India, Employees Cooperative Housing Society Ltd., .

41. On the above authorities, I also hold that the applicant has sufficient caveatable interest under section 283(1)(c) of the said Act.

42. Hence, the grant of probate dated 07th January, 2013 by this Court PLA No. 292 of 2012 (in the goods of Jibendra Nath Biswas) is revoked.

43. The first respondent is at liberty to obtain probate of the alleged Will of Jibendra Nath Biswas dated 4th November, 1991, in solemn form. In that case, the applicant will be entitled to be issued a special citation to enable to contest the probate.

44. The applicant will retain possession of the property, until orders passed to the contrary by a competent court of law. The present application is allowed to the above extent.



Urgent certified photocopy of this Judgment and order, if applied for; be supplied to the parties upon compliance with all requisite formalities.

LATER

Mr. Ahin Chowdhury, learned senior Advocate prays for stay operation of this judgment and order.

Let special citation not be issued to the applicant for a period of three weeks from date.