

(2019) 12 CAL CK 0126
In the Calcutta High Court

Case No : General Application (GA) No. 1884 Of 2019, Testamentary Suits (Ts)
No. 9 Of 2017

Kiran Bala Sahu (Deceased) And Others APPELLANT
Vs

Suprama Maiti & Anr RESPONDENT

Date of Decision : 24-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 39 Rule 1, Order 39 Rule 2

Citation : (2019) 12 CAL CK 0126

Hon'ble Judges : Arindam Mukherjee, J

Bench : Single Bench

Advocate : Sayed Hossain, Soumyajit Ghosh, Soumi Guha Thakurata, S.
Chatterjee

Final Decision : Dismissed

Judgement

Arindam Mukherjee, J

1) The petitioner is the executor of the last Will and testament dated 4th May, 1997 (hereinafter referred to as the said Will) said to have been left behind by Kiran Bala Sahu, deceased. Kiran Bala Sahu had one son Probodh Sahu and a daughter Bijali Rani Pakhira. Bijali has, however, pre-deceased Kiran Bala Sahu leaving behind Suprama Maiti and Swapan Pakhira, the defendants/respondents as her only heiress and heir. The plaintiff/petitioner and the defendants/respondents are, therefore, the legal heir and heiress of the deceased in intestacy. Probodh Sahu is the executor named in the said Will and is also the beneficiary thereunder. The estate comprises of immovable properties at District Purba Medinipur which are entirely outside the ordinary original civil jurisdiction of this Court. Probodh Sahu has applied for grant of probate of the said Will before this Court, on or about 2nd December, 2016, the grant is now being opposed by the defendants/respondents. The probate proceeding is pending after being marked as contentious cause and converted into a testamentary suit.

2) In the pending testamentary suit, the executor being also the beneficiary and the plaintiff/petitioner has applied for issuance of an order of injunction restraining the defendants/respondents from dealing with, disposing of, alienating and/or encumbering the properties of the estate said to have been left behind by Kiran Bala Sahu and the subject matter of the said will. The instant application (hereinafter referred to as the said application) has been made by the plaintiff/petitioner in the testamentary suit for injunctioning the respondents.

3) The petitioner submits that the respondents are required to be restrained by necessary orders of injunction from dealing with or disposing of the properties and assets of the estate till the grant is made in favour of the executor. Unless the respondents are restrained, the respondents will sell and continue to sell and/or dispose of or deal with the assets of the estate which will not only result in depreciation of the assets of the estate and diminishing its value but also will ultimately leave no properties and assets of the estate for assent to the beneficiary after the grant. The Court should exercise its inherent powers to restrain the respondents otherwise the executor-cum-beneficiary will be seriously prejudiced. It is further submitted by the petitioner showing a conveyance annexed to the affidavit-in-opposition that a prima facie case has been made out against the respondents, as the said conveyance demonstrate that the respondents have sold out at least one of the properties of the estate and there is every likelihood of the respondents selling out other properties of the estate if not prevented. The petitioner further submits the balance of convenience and inconvenience is in favour of the petitioner, as in the capacity of an executor as also being the beneficiary, the petitioner is entitled to an injunction to protect the properties and assets of the estate. The petitioner further submits that the petitioner has made out a prima facie case as against the respondents for going to trial.

4) The petitioner refers to a suit filed by the petitioner before the Tamluk Court at Purba Medinipur as against the respondents and the third party purchaser for declaration and permanent injunction. The petitioner submits that in the event, this Court does not want to exercise its jurisdiction under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 to injunct the respondents, this Court in exercise of its inherent powers under section 151 of the Code of Civil Procedure, 1908 is competent to issue the orders of injunction restraining the respondents from dealing with disposing of alienating, encumbering or selling the assets of the estate while exercising probate jurisdiction and the instant case is fit for exercising of such inherent powers. The petitioner relies upon a Division Bench Judgment of this Court reported in AIR 1951 Cal 561 (Atula Bala Dasi Vs. Nirupama Devi) for the purpose of exercising the inherent powers of the Court to issue injunction in a testamentary suit.

5) The respondents have contested the said application by filing their affidavits wherein they have raised the question of jurisdiction of probate Court in granting injunction with regard to the properties of the estate. The respondents have also

submitted that unless the Will is proved and a probate has been issued neither the executor nor the beneficiary can say that the properties being the subject matter of the estate has devolved unto the beneficiary thereby conferring the beneficiary with the right to seek injunction. In absence of the grant, the petitioner as an executor cannot also file and maintain the instant application. Moreover, the probate Court does not decide the title of the properties being the subject matter of the estate and as such it is not competent to grant injunction as prayed for.

6) The petitioner in reply submits that the probate Court in a proper case should invoke the inherent jurisdiction to pass necessary orders of injunction otherwise by the end of the testamentary suit, no assets of the estate will remain for administration and assent. This will lead to multiplicity of judicial proceedings which also supports the order of injunction as prayed for being passed.

7) After considering the rival contentions, the materials on record, I find that the petitioner has complained of the respondents having sold 3.5 decimal of land situate at RS Plot No.666, L.R. Khatian No.730, P.S- Kolaghat, Mouza-Kodalia Gram Panchayat Bhogpur in the district of Purba Medinipur. In the schedule of the said Will, I find that in Dag No.666 out of Jal 07 decimal, the said Will involves 1/3rd share thereof being 21/3 decimal. It is, therefore, difficult to ascertain at this stage whether the respondents have sold out a portion of land covered by the said Will or a separate land as there is no demarcation as to the 21/3 decimal of land as mentioned in the said Will. The petitioner has instituted a civil suit and the rights in respect of the property said to have been sold by the respondents will be decided therein. The petitioner has also not been able to show any document in support of its apprehension that the respondents would sell out other properties of the estate. The petitioner has not given particulars of the properties covered under the Will being in the possession of the respondents. In absence of any document to support the petitioner's apprehension particularly when from the sale complained of, it is not clear whether the respondents have sold a property covered by the Will, it will be not proper for this Court to exercise its inherent jurisdiction to pass the orders of injunction following the ratio laid down in *Atula Bala Dasi* (supra) relied by the petitioner. That apart and in any event, it is well settled that the probate Court is invited to see whether the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue influence and the same was duly attested. The probate Court is not competent to determine the question of title of the properties bequeathed under the Will nor can it go into the nature of such property as to whether it was joint ancestral property or self-acquired property of the testator. The title of the properties, as mentioned in the Will or those which may have been left behind by the testator being the subject matter of the estate covered by the Will does not fall for consideration in a testamentary suit. In this context, we may refer to the following judgments of the Hon'ble Supreme Court reported in (2007) 11 SCC 357 (*Kanwarjit Singh Dhillon V. Hardy Singh Dhillon*), (2008) 4 SCC (*Krishna Kumar Birla V. Rajendra Singh Loha*), (1993) 2 SCC 283

(Chiranjilal Shrilal Goenka V. Jasjit Singh).

While exercising the jurisdiction over the testamentary suit, I am, therefore, not required to go into either the title of the properties bequeath or as to their origin and as such "any property in dispute in the suit" as stated in Order 39 Rule 1 of the Code of Civil Procedure, 1908 cannot also be the subject matter of a Testamentary suit. Unless there is a property in dispute in a suit the provisions of Order 39 Rule 1 of the Code of Civil Procedure, 1908 or the provisions of Specific Relief Act, 1963 are not attracted allowing a probate Court to grant temporary injunction.

8) So far as the exercise of inherent power of the Court is concerned, a subsequent Division Bench of this Court reported in AIR 1959 Cal 389 (Tulsiram Bhagwandas Vs. Sitaram Srigopal) has clearly held that if there is a specific provision available in the Code of Civil Procedure, 1908 for entertaining an application and passing the orders therein, the inherent power available to Court under section 151 of the Code of Civil Procedure, 1908 should not be used. Since Order 39 Rules 1 and 2 are the specific provision in the Code of Civil Procedure, 1908 following the ratio laid down in Tulsiram (supra) I am also not will to exercise the inherent powers in the facts of the instant case. The remedy if any to the petitioner to injunct the respondents lies in filing a suit before a competent Court and seek injunction therein. I am, therefore, not inclined to exercise the inherent power of this Court in granting the injunction as prayed for.

In the facts and circumstances as aforesaid, the said petition being G.A No.1884 of 2018 is accordingly dismissed.

There shall, however, be no order as to cost.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.