

(2013) 11 CAL CK 0029

In the Calcutta High Court

Case No : F.A. No's. 126 and 130 of 2011, C.O.T. No. 21 of 2011 and C.O. No. 1484 of 2011

Kumar Brothers

APPELLANT

Vs

Shrimati Sushma Berlia and Others

RESPONDENT

Date of Decision : 07-11-2013

Acts Referred:

Citation : (2014) 1 CALLT 128 : (2014) 2 CHN 492 : (2014) 1 WBLR 989

Hon'ble Judges : Subhro Kamal Mukherjee, J;Mrinal Kanti Sinha, J

Bench : Division Bench

Advocate : Anindya Kumar Mitra, Mr. Ashok Kumar Banerjee, Mr. Debasish Roy, Mr. Paritosh Sinha, Mr. Jishnu Chowdhury, Mr. Amitava Mitra, Ms. Dolon Dasgupta in F.A. No. 130 of 2011, Mr. Saktinath Mukherjee, Mr. Saptangshu Basu, Mr. Abhrajit Mitra and Mr. Kamallesh Jha in F.A. No. 126 of 2011, for the Appellant; H.L. Tikku, Samit Thakur, Aniruddha Chatterjee, Ms. Debamitra Adhikari, Rahul Karmakar and Ms. Siddique Parveen for the Respondent No. 1(a), Pratap Chatterjee, Sakya Sen, S. Trivedi, D. Mondal and Mr. Biswajit Kumar, for the Respondent

Final Decision : Allowed

Judgement

Subhro Kamal Mukherjee, J.—All these matters were heard analogously as all these matters arose from an order dated March 21, 2011 passed by the learned Additional District Judge, Eleventh Court at Alipore, district: South 24 Parganas, in Original Suit No. 10 of 2010. These proceedings concern the estate of Jit Paul, who died intestate on June 30, 2009, leaving behind him his two brothers and three sisters as his only heirs and legal representatives according to Hindu Succession Act, 1956.

2. On or about September 16, 2009, Kumar Brothers applied for grant of letters of administration u/s 218 of the Indian Succession Act, 1925, alleging that it has been a creditor of the deceased to the extent of Rs. 3,00,00,000/- (Rupees three crore) only. The said proceeding was registered as Act 39 Case No. 268 of 2009 (Letters of Administration) in the Court of the learned District Delegate at

Alipore, district: South 24 Parganas.

3. On or about November 25, 2009, the defendant No. 1 in the said proceeding, Dr. Satya Paul, appeared in the case and filed an application challenging the maintainability of the said proceedings, inter alia, on the ground that as one of the heirs and legal representatives he has filed an application for grant of letters of administration in the High Court at Delhi, which has, since, been registered as Testamentary Case No. 56 of 2009. It was alleged that the proceeding in the High Court at Delhi has been an earlier proceeding and, therefore, the present proceeding for letters of administration at the instance of an alleged creditor was not maintainable.

4. The said application challenging the maintainability of the proceedings for grant of letters of administration came up for consideration before the learned District Delegate and he rightly opined that as the proceeding has become contentious, it would be returned for presentation before the learned District Judge.

5. On or about December 22, 2009 Kumar Brothers lodged the proceeding before the learned District Judge at Alipore, district: South 24 Parganas. The defendant No. 4 in the said proceeding, namely, Shrimati Kamla Jindal, filed two applications before the learned trial Judge. The first application was u/s 247 of the Indian Succession Act, 1925, praying for appointment of the defendant No. 6 as the administrator pendent lite. The second application was an application for transposition filed under rule 10 of Order I of the CPC praying for her transposition from the category of the defendant to that of the plaintiff.

6. The defendant No. 1, namely, Dr. Satya Paul, the eldest brother of the deceased, challenged the maintainability of the proceeding by filing a petition.

7. Unfortunately, the defendant No. 1, Dr. Satya Paul died intestate on June 7, 2010, leaving behind him his widow and one daughter as his only heirs and legal representatives under the Hindu Succession Act, 1956. Those heirs and legal representatives of Dr. Satya Paul have, already, been substituted in the proceeding as defendant Nos. 1(a) and 1(b).

8. Eventually, the proceeding was transferred to the Court of the learned Additional District Judge, Eleventh Court at Alipore, district: South 24 Parganas.

9. By the order impugned, the learned Additional District Judge rejected the prayer for transposition of the defendant No. 4 from the category of defendant to the category of plaintiff and rejected the application for grant of letters of administration holding the same to be not maintainable at this juncture.

10. The learned judge held that the defendant No. 4 was not acting bona fide, but was attempting desperately to dislodge and deprive the substituted defendant 1, who was standing on equal footing with her.

11. The learned Judge opined that as the defendants were opposing such petition

for transposition apprehending collusion, it would not be in the interest of justice to transpose the defendant No. 4 as a co-plaintiff.

12. The learned Additional District Judge, also, rejected the petition for grant of letters of administration holding the same to be not maintainable at this juncture.

13. Consequently, the petition filed by the defendant No. 4 u/s 247 of the Indian Succession Act, 1925, praying for appointment of the defendant No. 6 as the administrator pendent lite was, also, dismissed.

14. The learned Additional District Judge held that the present suit though technically seem to have been filed on December 22, 2009, was, in fact, filed on September 16, 2009 in the court of the learned District Delegate where as the proceeding before the High Court at Delhi was instituted on November 10, 2009. Thus, he rejected the contention of the defendant No. 1 series that the Delhi case was an earlier one.

15. The learned judge relied upon the provisions of Section 218 of the Indian Succession Act and proceeded on the basis that it envisaged that when no heir and legal representative has filed an application for letters of administration, the letters of administration could, only, then be granted to a creditor of the deceased. The learned judge opined that a creditor has other option to get his money back by filing a suit where as the heir and legal representative has no option except filing of a petition u/s 218 of the Indian Succession Act. The learned judge opined that when one of the heirs and legal representatives has, already, appeared in the picture and initiated a proceeding in the High Court at Delhi for letters of administration in relation to the estate of the deceased, a creditor could not be allowed to remain in the driver's sit. Thus, the learned judge rejected the petition for grant of letters of administration as not maintainable at this juncture.

16. The plaintiff, Kumar Brothers filed an appeal, which has, since, been registered as F.A. No. 130 of 2011.

17. The defendant No. 4, Shrimati Kamla Jindal filed an appeal, which has, since, been registered as F.A. No. 126 of 2011.

18. The substituted defendant No. 1(a) filed a cross-objection, which has, since, been tendered under C.O.T. No. 21 of 2011. In the cross-objection the main contention of the defendant No. 1(a) is that the learned District Delegate returned the petition for letters of administration as it became contentious. Thus, it was not a case of transfer of a proceeding from one court to another. The learned Additional District Judge, thus, erred in law in holding, inter alia, that this original suit was in continuation with the proceedings instituted before the learned District Delegate.

19. A civil revisional in application is, also, filed challenging the order rejecting the prayer for transposition. The revisional application was registered as Civil Order No. 1484 of 2011. In substance, it is an alternative revisional application

to F.A. No. 126 of 2011.

20. The Hon'ble Chief Justice, by order dated July 18, 2004, assigned the revisional application to be heard analogously with F.A. No. 126 of 2011.

21. Mr. Anindya Kumar Mitra and Mr. Sakti Nath Mukherjee, learned senior advocates appearing in support of these appeals and the revisional application, and Mr. Pratap Chatterjee, learned senior advocate for the respondent No. 6 submit that the learned Additional District Judge applied wrong legal test in rejecting the application for letters of administration. It is submitted that the proceeding in Calcutta is the earlier proceeding. The deceased had his last abode at Calcutta. Most of his natural heirs and legal representatives are at Calcutta. Therefore, the court of the District Judge, South 24 Parganas, has been the natural forum. While considering an application for rejection of the plaint, the court must proceed on the basis of the averments made in the plaint. The court cannot be divested of the jurisdiction because somebody else has filed a proceeding subsequently. To whom, upon a contested cause, the letters of administration would be granted has been a matter of discretion of the court and, therefore, such issue can very well be decided in an application filed by the creditor particularly when all the heirs and legal representatives are on record in such proceeding.

22. Mr. H.L. Tikku, learned senior advocate appearing for the defendant Nos. 1 series, however, strenuously, submits that the proceeding for letters of administration at Alipore court was not maintainable in view of initiation of proceeding for letters of administration by one of the natural heirs in the High Court at Delhi. He, thus, submits that the application filed by Kumar Brothers, an alleged creditor, has ceased to be maintainable. In support of his contention he cites decisions in the cases of *In the matter of the will of R. Santhana Mudaly (deceased)*; *Thillainayagi Ammal versus Saradambal* reported in AIR 1955 Madras 576 *Southern Bank Ltd. Vs. Kesardeo Ganeriwalla and Others*, , *R.S. Sinha Vs. Miss Salena Hector*, and *C.P. Paul Vs. Hydro Power Constructions, Kothamangalam and Others*,

23. In all those cases the deceased persons have left behind wills. In none of those cases the issue relating to maintainability of an application by the creditor for grant of letters of administration of an intestate deceased arose for consideration. Further, it is also not a disputed proposition in law that such proceedings for grant of probate could be opposed only by a person, who would be affected by the grant of probate of the will.

24. In *Raja Rama Vs. Fakuruddin Sahib and Others*, , it was not the creditor, who had applied for grant of letters of administration of the deceased's estate and, therefore, the issue in question did not even arise for consideration.

25. *Akhileswar Saha Pramanick Vs. State of West Bengal*, holds that on the death of a person dying intestate, a creditor can pursue any of two remedies that is, before Civil Court or u/s 218 of the Indian Succession Act for administration of

the estate. The creditor has an option. There is nothing in the judgment which goes against the appellants' case.

26. In *Raja Rama* (Supra) the right to obtain a grant of letters of administration and the right to institute an application for grant of letters of administration are two different matters. Creditor has the right to institute the application and nowhere in this judgment it been said that the creditor has no such right. Whether the creditor shall be granted letters of administration is a separate matter and is not in issue in this appeal. Creditor definitely has a right to apply.

27. In the matter of the will of *R. Santhana Mudaly* (deceased); *Thillainayagi Ammal* (supra) the issue in this case is whether the creditor has caveatable interest to oppose grant of probate. It has been held in AIR 1944 11 (Privy Council) that creditor has caveatable interest. Anyhow, this issue has been laid to rest by the Supreme Court in the judgment reported in *Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others*, (paragraph 95 of the report), where incidentally the Supreme Court of India has approved the aforesaid decision in *Sarala Sundari Dassya* (supra).

28. In *Southern Bank Limited* (supra) this is a case of revocation of probate and pertains to caveatable interest. It does not apply to the facts of the present case at all.

29. In *R.S. Sinha* (supra) again, this is a case of caveatable interest. The Patan High Court has discussed as to whether a mere creditor has an interest in the estate or can oppose probate.

30. In *C.P. Paul* (supra) it was discussed whether a creditor has the right to oppose grant of probate and in that light, whether such creditor has interest in the estate.

31. In *Gobind Lal Nakphopha Vs. The Administrator-General of Bihar and Others*, lays down whether letters of administration can be granted to a creditor. The question of whether application for grant of letters of administration can be made by creditor has not been discussed.

32. In the goods of *Makhan Lall Chatterjee*, deceased reported in 15 Calcutta Weekly Notes 350 it has been held that letters of administration might be granted to a creditor although the liabilities of the deceased debtor appeared to be in excess of the assets. The application in the insolvency court is not the creditors only remedy.

33. In *Akhileswar Saha Pramanick* (supra) a bench of this Court holds that a creditor of a deceased dying intestate can go to the Civil Court and obtain a decree in respect of his claim. He has, also, the right to apply for letters of administration u/s 218 of the Indian Succession Act in case there is no application by anybody for letters of administration. The fact that he has not taken recourse to a regular suit is no ground for refusing letters of administration to him if he is otherwise entitled to the same.

34. The application of the defendant No. 1 was not an application for return of the plaint or for stay of the proceeding on account of institution of a subsequent proceeding. It was, in substance, an application for rejection of the plaint.

35. Thus, we are of the opinion that the learned Additional District Judge committed a serious error of law in holding that the application for letters of administration was not maintainable as it was filed by a creditor when an application for letters of administration has been initiated by a natural heir in the High Court at Delhi.

36. It is settled law that whether the plaint discloses cause of action or not should be determined on the basis of averments in the plaint and nothing else. There is sharp distinction between non-existence of cause of action and nondisclosure of cause of action. The plaintiff has an alternative efficacious remedy is no ground to reject the plaint. Where the suit appears, from the statement in the plaint, to be not barred by any law, the Court would not reject the plaint.

37. The deceased, Jit Paul died at 13A, Alipore Road, Kolkata - 700027. It was demonstrated that the fixed abode of the deceased was at Alipore and not anywhere else. The properties of the deceased are within the jurisdiction of the Alipore Court. Had the plaintiff applied only on the ground that testator's properties are within the jurisdiction of the Alipore Court, the Alipore Court might have a discretion to refuse the application, if it felt that the application could be disposed of more justly and conveniently by another Court. Such discretion is not available to the Court when the fixed abode of the deceased, at the time of his death, was within the jurisdiction of the Alipore Court.

38. Thus, when it is crystal clear from the affidavit and pleadings that the fixed abode of the deceased, Jit Paul, was at Calcutta, under Sections 270 and 271 of the Indian Succession Act, 1925, the Court has no discretion to return the application for being disposed of more justly and conveniently by another Court. The question would have been relevant had the fixed abode of the deceased been in Delhi and not within the jurisdiction of the Alipore Court.

39. Section 218 of the Indian Succession Act, 1925, envisages that if the deceased has died intestate and was Hindu, Mohammedan, Buddhist, Sikh, Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

40. However, when several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

41. When no such person applies, it may be granted to a creditor of the deceased.

42. The provision to the aforementioned Section is to be read with the provisions

of Section 254 of the Indian Succession Act, 1925. Section 254 of the Indian Succession Act, 1925, envisages that when a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the State, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

43. In every such case, letters of administration may be limited or not as the Court thinks fit.

44. Section 298 of the Indian Succession Act, 1925, points out that a grant under the Section is discretionary with the Judge.

45. Thus, the provision of Section 218 of the Indian Succession Act, 1925 does not compel the Court to always issue letters of administration in favour of an heir. Section 254 of the Indian Succession Act, 1925 empowers the Court to appoint a person other than one who, in ordinary circumstances, would be entitled to a grant of administration.

46. It is not necessary that letters of administration of an intestate deceased has to be granted to the applicant for such grant. The applicant would not be entitled to such grant if the Court in its discretion thinks fit to do so. Therefore, it is not, always, necessary that grant of letters of administration will have to be made to an heir in intestacy u/s 218(1) of the said Act, even if such an heir has expressed his/her willingness to accept such grant. The Court may in its discretion having regard to the safety of the estate and probability that it will be properly administered by a third person, appoint a third party to be an administrator.

47. The Court could exercise its discretion in granting letters of administration in favour of a person whom the court thinks is most competent to administer the estate.

48. Therefore, letters of administration can be granted to a third party in preference to an heir in intestacy of the said deceased. Moreover, the respondent No. 4, a natural heir, has expressed her willingness to accept such grant.

49. The learned Additional District Judge, rightly, in our view, rejected the contention of the defendant No. 1 that the suit was filed only on December 22, 2009 and it was not continuing the proceeding from the court of the learned District Delegate.

50. The application for letters of administration was filed on September 16, 2009 being Act 39 Case No. 268 of 2009 (Letters of Administration). As the proceeding became contentious, the learned District Delegate returned the petition for re-presentation of the petition before the learned District Judge. It was represented

on December 22, 2009 and was registered as an original suit.

51. The plaint was not returned under Order 7, rule 10 of the Code of Civil Procedure. The transfer of the case was consequential upon the application being converted into a contentious cause in accordance with the provisions of Section 295 of the said Act. On conversion of a case u/s 295 of the said Act, a new proceeding does not commence. A contentious cause is a continuation of the original application for letters of administration.

52. In R.S. Lodha Vs. Laxmi Devi Newar, , it has been held:

17. While summing up the aforesaid principles of law laid down by the several High Courts including this Court it appears to me that one application for grant of Probate is filed it does not lose its original character and remains the same. Only the method of trial is changed when there has been contest. Section 259 as well as the rule 28 Chapter XXV of the Original Side Rules only facilitate the Court to deal with the matter following the procedure for trial of application for grant of nothing else...

53. In Balai Lall Banerjee and Others Vs. Debaki Kumar Ganguly and Others, it has been held as under:

13. The fact that a contentious proceeding is classified as a suit, in our view, does not make much of difference. If the proceeding is to culminate in a decree there ought not to be any distinction between a contentious or non-contentious proceeding. In the case of a suit within the meaning of the CPC the final adjudication whether contested or ex-parte must be followed by a decree. To hold that a contentious proceeding for the grant of Probate only shall be treated as a suit and, therefore, required to be followed by a decree, while a non-contentious proceeding ending with an order for grant need not be followed by a decree seems to be against common sense. If it is a suit, it is so far all practical purposes - whether contentious or otherwise. In our view, therefore, the provisions in Section 295 is merely for the purpose of classification. The provisions for the application of the CPC as far as may be is intended only to indicate the procedure to be followed in disposing of an application for grant of Probate, or letters of Administration as the case may be.

54. The learned Additional District Judge rejected the application of the defendant No. 4 for her transposition in the category of the plaintiff. The learned judge opined that the application of the defendant No. 4 was not bona fide and was a mischievous and desperate attempt to dislodge and deprive the defendant No. 1 series. However, the Court accepted that the defendant No. 4 and the defendant No. 1 stood on the equal footing.

55. The learned Additional District Judge, principally, rejected the prayer for transposition of the grant as another legal heir was opposing such petition for transposition apprehending collusion. Therefore, it was held that it would not be in the interest of justice in not transposing the defendant No. 4 as co-plaintiff.

56. What is important while considering the prayer for transposition is that the defendant No. 4, admittedly, is a natural heir of the deceased under the Hindu Succession Act, 1956. The defendant No. 1 was, also, standing on the same footing.

57. The plaintiff did not oppose the prayer for transposition. There was no conflict of interest between the defendant No. 4 and the plaintiff. The plaintiff never disputed genuineness, bona fide or the interest of the defendant No. 4 in the litigation. The substituted defendant No. 1(a) is a heir within entry IV, Class II of the Schedule to the Hindu Succession Act, 1956. Therefore, in the order of Succession she was not to be preferred over the defendant No. 4.

58. It is settled law, the transposition should be readily allowed if the plaintiff agrees to such transposition.

59. Moreover, in not allowing transposition of the defendant No. 4 in the category of the plaintiff, there would be multiplicity of proceedings in as much as defendant No. 4 would be compelled to file her own proceedings for letters of administration.

60. In transposing the defendant No. 4 there would be no change of the character of the proceeding and it is always held that transposition would be granted if refusal would drive the application to filing of another proceeding there be leading to multiplicity of proceedings.

61. Thus, the order impugned stand set aside. The application filed by the defendant No. 1 challenging the maintainability of the proceedings is rejected.

62. The suit is restored to its original file and number.

63. The application filed by the defendant No. 4 for her transposition as co-plaintiff stands allowed and she is transposed as the co-plaintiff.

64. The learned Additional District Judge is requested to dispose of the suit as expeditiously as possible without granting any unnecessary adjournment.

65. Thus, the appeals are allowed. The cross-objection is dismissed. The revisional application is, also, allowed.

66. Before we part we record that the deceased came from a well-known and respected family. We requested the parties to settle their disputes to avoid any allegations or counter-allegations in court. We gave them sufficient time. Unfortunately, they could not settle their dispute. We cannot give them further time in view of the imminent retirement of one of us (Mrinal Kanti Sinha, J.)

67. We make no order as to costs. Urgent photostat certified copies of the judgment, if applied for, are to be supplied to the learned advocates for the parties expeditiously.

Mrinal Kanti Sinha

I agree.