

CASE NO.:
Appeal (civil) 5784 of 2002

PETITIONER:
BINAPANI KAR CHOWDHURY

RESPONDENT:
SRI SATYABRATA BASU AND ANR.

DATE OF JUDGMENT: 16/05/2006

BENCH:
B.P. SINGH & R.V. RAVEENDRAN

JUDGMENT:
JUDGMENT

B.P. SINGH, J. :

This appeal, by special leave, is directed against the judgment and order of the High Court of Judicature at Calcutta in C.O. No. 197 of 2002 whereby the High Court while disposing of the revision preferred by the appellant herein directed that the suit shall not proceed till such time as the Will said to have been executed by Avarani Bose was not probated.

2. The facts relevant for the disposal of this appeal as stated by the appellant are as follows :-

2.1. Late Avarani Bose was the owner of the suit property. The said Avarani Bose executed a registered sale deed in her favour on 23.12.1994 in respect of the suit property. The appellant resides in the first floor.

2.2. The said Avarani Bose filed Title Suit No. 10 of 1995 in the Court of Civil Judge, (Sr. Division), 8th Court, Alipore for declaration of title in respect of the suit property and for recovery of possession and injunction with respect to first floor of the suit property claiming that she had never sold the suit property to the appellant. The appellant, who was defendant No. 1 in the suit, controverted the allegations in the plaint and asserted that the property was in fact sold to her by the said Avarani Bose on 23.12.1994, and that sale deed was valid and binding on the vendor. The core issue in the suit is whether the said Avarani Bose had sold the suit property by a valid registered sale deed executed on 23.12.1994 in favour of the appellant.

2.3. The said Avarani Bose died on 13.11.1997. An application was filed under Order XXII Rule 3 of the Code of Civil Procedure (for Short CPC') by respondent No. 1 herein claiming substitution as the legal representative of the deceased plaintiff on the basis of a Will dated 16.5.1996 said to have been executed in his favour by Avarani Bose. He claimed to be the executor and legatee under the said will. The Appellant admits that the first respondent is in possession of a portion of the ground floor of the suit property. (The first Respondent claimed that he was in possession in his own right whereas the appellant claimed that he was the tenant of the ground floor). None else sought to come on record as the Legal Representative of Avarani Bose. Though, the appellant herein objected to the substitution of respondent No. 1 as legal representative of deceased plaintiff, her objections were rejected and respondent No. 1 was brought on record as the legal representative of Avarani Bose.

2.4. Though the recording of evidence in the suit has been completed, the court has not proceeded to hear arguments and dispose of the suit, in view of the pendency of the probate proceeding, initiated by the first respondent in regard to the will of Avarani Bose. As the matter was pending for long, on 5.10.2001, the appellant filed an application under section

151of CPC before the trial court praying that the court may proceed with the hearing and decide the suit. The appellant inter alia contended that first respondent herein was deliberately prolonging the probate proceedings, so as to keep the suit against appellant pending as that enabled him to continue to reside in the ground floor of the suit property without paying rents/damages for occupation. The appellant also contended that she is old and is prevented from enjoying the entire suit property as owner, in view of the pendency of the suit.

2.5. The appellant's prayer was rejected by the trial court by order dated 5.10.2001 on the ground that the suit cannot be disposed of till the probate is granted. The appellant therefore moved the Calcutta High Court under section 115 CPC by way of a revision petition. The said revision has been rejected by the High Court by its impugned order of February 7, 2002 holding that if a suit has been initiated by a testator, on his death, the Executor of his will can get substituted, but the Executor must get probate before final disposal of the suit. The said order is under challenge in this appeal.

3. The first respondent though served has remained unrepresented. The appellant in her application for early hearing has alleged that the petition for probate filed by the first respondent has been dismissed for default on 7.9.2005. The appellant has not, however, produced the order dismissing the first respondent's petition for issuance of probate. The learned counsel for appellant is also not able to state as to whether the said petition for probate has been restored thereafter. In the absence of any material in that behalf, it is not possible for us to take note of the said subsequent event.

4. Section 213 of the Indian Succession Act ('Act' for short) provides as to when the right of the executor or legatee is established. Sub-section (1) thereof provides that no right as executor or legatee can be established in any court 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 a copy of the Will annexed.) It is not in dispute that the said Section applies in the case of Wills made by a Hindu who is a resident of Calcutta. The trial court and the High Court have proceeded on the basis that having regard to section 213 of the Act, the suit cannot be decided unless the executor of the Will produces the probate. Section 213 clearly creates a bar to the establishment of any right under a Will by the executor or legatee unless probate or letters of administration of the Will have been obtained. This Court in *Mrs. Hem Nolini Judah v. Mrs. Isolyne Sarojbashini Bose*, AIR (1962) SC 1471, held as follows :

"The words of S.213 are not restricted only to those cases where the claim is made by a person directly claiming as a legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the will under which he claims. What it says is that no right as an executor or legatee can be established in any Court of Justice, unless probate or letters of administration have been obtained of the will under which the right is claimed, and therefore, it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration."

5. Therefore, where the right of either an executor or a legatee under a Will is in issue, such right can be established only where probate (where an executor has been appointed under the Will) or letters of administration (where no executor is appointed under a Will) have been granted by a

competent court. Section 213 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will. Section 213, however, bars a decree or final order being made in such suit or action which involves a claim as an executor or a legatee, in the absence of a Probate or Letters of Administration in regard to such a will. Where the testator had himself filed a suit (seeking a declaration and consequential reliefs) and he dies during the pendency of the suit, the executor or legatee under his will, can come on record as the legal representative of the deceased plaintiff under Order 22 Rule 3 CPC and prosecute the suit. Section 213 does not come in the way of an executor or legatee being so substituted in place of the deceased plaintiff, even though at the stage of such substitution, probate or letters of administration has not been granted by a competent court.

6. However, there appears to be some divergence in views on the question whether a decree can be passed in the absence of probate (or letters of administration) where the suit or action has been initiated by the testator himself (and not by any one claiming a right as the executor or legatee under a Will) and the Executor/Legatee subsequently comes on record as the legal representative on the death of the testator. One view is that after the death of the testator, when an executor or a legatee comes on record and proceeds with the suit, he is trying to enforce his right under a Will and, therefore, section 213 would come into play and the probate or letters of administration will have to be obtained before the judgment is delivered (see Arijit Mullick v. Corporation of Calcutta, (1979) 2 Cal. L.J. 426. The other view is that Section 213 will not apply as the suit was not filed to establish any right of an Executor or Legatee under a Will, and that as the testator himself having filed the suit, the issue in the suit is only about the right claimed by the testator/plaintiff and not about the right claimed by the Executor/Legatee under the Will (see Gobinda Ballav Chakraborty v. Biswanath Mustafi, AIR (1980) Cal. 143. We do not propose to examine this question in this appeal, as the respondent is unrepresented, and this appeal can be disposed of on the special facts and circumstances of this case.

7. The suit is of the year 1995 and the original plaintiff died in 1997. The first Respondent came on record as Executor and Legatee of the original plaintiff in pursuance of an order dated 10.8.1998. The evidence had been concluded long ago. But till now the first respondent has not obtained the probate of the Will. The appellant-defendant is stated to be 74 years old. The said suit, wherein the validity of the sale deed executed in favour of the appellant by Avarani Bose is questioned, has been pending without a decision for more than a decade. The first respondent has not even chosen to appear in this appeal nor explained the delay in securing probate, thereby lending credence to the claim of the appellant that the first respondent is deliberately protracting the probate proceedings so that he can avoid a decision in this case and continue to be in possession of the ground floor.

8. Therefore, with a view to do complete justice between the parties, it is appropriate to direct the trial court (Civil Judge, Senior Division, Alipore), where T.S. No. 10/1995 is pending, to proceed to hear arguments and deliver judgment in the suit. Nothing further will be required, if the suit is to be dismissed. But if the suit is to be decreed, the trial court should make it clear that the judgment and decree will come into effect only on the first respondent obtaining and producing the probate of the will, and till then the decree should be considered only as provisional and not to be given effect. We dispose of this appeal accordingly making it clear that nothing stated above is an expression of any opinion on merits of the case.