

IN THE HIGH COURT AT CALCUTTA
(Testamentary & Intestate Jurisdiction)

ORIGINAL SIDE

Present:
The Hon'ble Justice Krishna Rao

IA No. GA 4 of 2023

In

TS 7 of 2017

(PLA 169 of 2015)

In the Goods Of:

Biswadeb Banerjee @ Biswadeb Bandyopadhyay, Deceased

And

Jhunu Banerjee

Versus

Smt. Rina Bhowmik

Ms. Mandeep Kaur, Adv.

Mrs. Piyali Kulavi, Adv.

.....For the plaintiff

Heard on : 09.02.2024

Judgment on : 20.02.2024

Krishna Rao, J.:

1. The applicant, namely, Jayanta Sen, S/o Late Pannalal Sen has filed this present application for recording the death of the plaintiff Jhunu Banerjee and to substitute his name as plaintiff being the representative and sole Executor of the last Will and Testament of Jhunu Banerjee and for amendment in the plaint. After filing of the present application, the applicant has also filed a supplementary affidavit praying for allowing the applicant to proceed with the case for grant of Letters of Administration instead of grant of probate.
2. Initially Jhunu Banerjee had filed an application being PLA No. 169 of 2015 for grant of probate of the last Will and Testament dated 18th August, 2013 of the testator, Biswadeb Banerjee @ Biswadeb Bandyopadhyay. Smt. Rina Bhowmik being one of the sister of the Testator has filed an affidavit in support of her caveat challenging the alleged Will and accordingly, PLA No. 169 of 2015 is converted to Testamentary Suit. During the pendency of the suit, the Executor, Jhunu Banerjee died on 29th June, 2022.
3. Now, the applicant has filed the present application stating that Jhunu Banerjee was unmarried and during her life time, she has published her last Will and Testament on 11th January, 2022 by appointing the applicant as her sole Executor. The applicant had also filed another application being PLA No. 543 of 2022 for grant of probate of the last Will and Testament of the deceased Jhunu Banerjee. The applicant

says that the applicant being the Executor of the deceased Jhunu Banerjee is representing the estate of the deceased and thus the applicant is the legal representative of the deceased plaintiff. Applicant says that the applicant being the Legatee of the estate of the Testatrix in the Will dated 11th January, 2022 is entitled to represent the estate of the deceased plaintiff.

4. The applicant prays for recording the death of the plaintiff and to substitute his name as legal representative of the deceased plaintiff and to convert the probate proceeding to grant of Letters of Administration. The applicant relied upon the judgment reported in **(2009) 10 SCC 223 (FGP Limited -vs- Saleh Hooseini Doctor and Another)** and submitted that under Section 211 of the Indian Succession Act, 1925, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vest in him as such the legal representatives will have the same meaning as has been given in Section 2(11) of the Code of Civil Procedure, 1908.
5. The applicant further relied upon the judgment reported in **1978 SCC OnLine Cal 153 (Bali Ram Dhote -vs- Bhupendra Nath Banerjee and Others)** and submitted that the executor derives his title from the Will and immediately after the testator's death, his property vests in the executor as the law knows no interval between testator's death and the vesting of the property.

- 6.** The defendant, Smt. Rina Bhowmik has filed her affidavit in opposition to the application wherein the defendant has challenged the locus standi of the applicant and raised the point of maintainability of the application. The defendant says that the Testator of the Will, Dr. Biswadeb Banerjee was married. The name of the wife of the deceased is Smt. Chhanda Banerjee and she is also drawing the family pension from the State Govt. Ex-Chequer. The defendant says that the deceased Jhunu Banerjee belongs to an orthodox and conservative family and did not allow any member of other caste/community to take part of their family activities and the applicant belongs to other caste/community.
- 7.** The defendant says that the applicant had involved helping the deceased Jhunu Banerjee with bad intension and ill motives to avail financial benefits since Jhunu Banerjee was a family pension holder and was drawing Rs. 20,000/- per month as family pension. The defendant says that the defendant has performed all last ritual rites of the deceased Jhunu Banerjee being only surviving family member. The defendant says that the Will is prepared by an Advocate and the attesting witnesses are associated with the Testamentary Suit No. 7 of 2017.
- 8.** The defendant prays for dismissal of the application filed by the applicant. Though the defendant has filed objection to the application but inspite of several opportunities, the Counsel for the defendant has not appeared before this Court and has not argued the matter. The

matter was fixed on 25th January, 2024, none appeared on behalf of the defendant, but for the interest of justice the case was adjourn till 9th February, 2024 with the rider that if on the date fixed, the respondent fails to appear, appropriate order will be passed and on 9th February, 2024, none appeared on behalf of the defendant and no accommodation is prayed for, accordingly, the matter is taken up for final hearing.

9. The applicant has filed this application on the basis of the Will executed by the deceased plaintiff, Jhunu Banerjee on 11th January, 2022 by appointing the applicant as Executor. In the Will, it is recorded that *“My elder brother Biswadeb Banerjee died unmarried. Prior to his death he executed a Will in my favour. I have applied for grant of probate of the said Will before the Hon’ble Calcutta High Court which has been registered as PLA No. 169 of 2015. If during my life time the said probate is not disposed off then in my absence Jayanta Sen shall conduct the said probate matter case as well as the executor of this instant Will.”*
10. Section 211 of the Succession Act, 1925 reads as follows :

“211. Character and property of executor or administrator as such.—

(1) *The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.*

(2) *When the deceased was a Hindu, Muhammadan, Buddhist, [Sikh, Jaina or Parsi] or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the*

deceased person which would otherwise have passed by survivorship to some other person.”

A bare reading of Section 211 of the Indian Succession Act, 1925, shows that the property vested on the executor by virtue of the Will and not by virtue of probate. The Will gives property to the Executor, the grant of probate is only a method by which the law provides for establishing the Will. Section 211 of the Indian Succession Act, 1925, further provides that the estate of the deceased vests on the executor, the vesting is not of beneficial interest in the property, but only for the purpose of representation.

11. Section 2(11) of the Code of Civil Procedure, 1908 reads as follows:

“2. Definitions.-

(11) *“Legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”*

In the case of **FGP Limited (Supra)**, the Hon’ble Supreme Court held that under Section 211 of the Succession Act, 1925, the executor or administrator, as the case may be, of a deceased person is the legal representative for all purposes, and all the property of the deceased person vests in him as such. The legal representatives will have the same meaning as has been given in Section 2(11) of the Code of Civil Procedure, 1908.

- 12.** In the present case, the plaintiff, Jhunu Banerjee has executed a Will by appointing the applicant as Executor of her last Will and the testatrix empowers the executor, the applicant herein to conduct the probate matter. The applicant being the Executor represents the estate even before he has taken the probate. As such probate is not necessary to make an executor entitled to the properties as his title is derived under the Will. There is nothing in law to prevent the executor from acting as an executor and exercise a power given to him without obtaining probate.
- 13.** As regard to the locus standi and maintainability of the application, the defendant has made out a case in the affidavit-in-opposition that the alleged Will is manufactured and was obtained by virtue of undue influence and the deceased, Biswadeb Banerjee was married and the wife of the deceased is drawing monthly pension, the plea raised by the defendant cannot be decided in the present application as the defendant is already contesting the probate matter by filing affidavit in support of caveat and the genuineness of the Will is to be considered at the time of hearing of the suit on merit.
- 14.** In view of the above, the death of the plaintiff, Jhunu Banerjee be recorded and the name of the applicant be substituted as plaintiff. The suit be treated for grant of Letters of Administration instead of grant of Probate. Prayers (a) to (d) of the Supplementary affidavit are allowed. The Department is directed to carry out the amendment within three weeks. The applicant is directed to re-verify and re-affirm the affidavit

within two weeks thereafter. The plaintiff is directed to serve the copy of the amended plaint to the defendant within a week thereafter.

15. G.A. No. 4 of 2023 is thus **disposed of**.

(Krishna Rao, J.)