



2021:CHC-OS:388

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

IA No: GA 3 of 2022

In CS 96 of 2020

Sangita Saha & Anr.

Versus

Jaya Saha & Anr.

Mr. Probal Kumar Mukherjee

Mr. Arnab Mukherjee

Mr. S. Pyne

... For the plaintiffs/petitioners.

Mr. Shounak Mukhopadhyay

Ms. Ankita Chowdhury

Mr. Sayantan Bose

... For the defendant no. 1.

Hearing Concluded On : 12.04.2023

Judgment on : 30.06.2023



Krishna Rao, J.:

1. The petitioner being the defendant no.1 in Civil Suit No. 96 of 2020 had filed the present application praying for stay of all further proceedings in CS No. 96 of 2020 till final disposal of PLA No. 175 of 2022. pending before this Court.
2. Mr. Shounak Mukhopadhyay, learned Advocate representing the petitioner submits that the plaintiffs have filed the present suit claiming there 1/9th share each over the property left behind by the deceased Kuldeep Saha, who is the husband of the plaintiff No.1 and father of the plaintiff No. 2. He submits that the plaintiffs were well aware that the deceased Kuldeep Saha died after making and publishing his last Will and Testament dated November 26, 2016 by appointing one Mr. Sujit Guin as Executor.
3. Mr. Mukhopadhyay submitted that Mr. Sujit Guin had already filed an application being PLA No.175 of 2022 before this Court for grant of probate of the last Will and Testament of the deceased Kuldeep Saha which involves the suit property of the instant suit.
4. Mr. Mukhopadhyay submitted that the application filed by Mr. Sujit Guin for grant of probate with respect of the last Will and Testament of the deceased Kuldeep Saha, thus the present suit cannot be adjudicated conveniently unless the probate application filed by Mr. Guin is finally decided.



5. Mr. Mukhopadhyay submitted that the claim of the plaintiffs with respect of the suit scheduled property cannot be decided unless it is decided whether Kuldeep Saha died testate or intestate.
6. Mr. Mukhopadhyay submitted that validity or invalidity of the last Will and Testament of the deceased Kuldeep Saha cannot be adjudicated in the present suit.
7. Mr. Mukhopadhyay in support of his submission relied upon the following judgments :
 - (i) *(1999) 6 SCC 632 (K.T Lathika -vs- Seth Karsandas Jamanadas).*
 - (ii) *Unreported judgement passed in CO No. 177 of 2011 (Delta International Limited -vs- Mallika Investment Company Private Limited.)*
 - (iii) *1951 SCC Online Cal 40 (Atula Bala Dasi & Others -vs- Nirupama Devi & Another).*
8. On the other side, Mr. Probal Kumar Mukherjee, learned Senior Advocate representing the plaintiffs submitted that the deceased Kuldeep Saha died intestate and after his death, the plaintiffs being the Class-1 heirs of the deceased Kuldeep Saha are entitled to get their respective share on the property left behind by the deceased Kuldeep Saha.
9. Mr. Mukherjee submitted that after the death of Kuldeep Saha, the defendants did not show any sympathy or concern for the plaintiffs. The plaintiffs were informed that after the death of Kuldeep Saha, all ties of the defendants with the plaintiffs had snapped and they did not



recognise the plaintiffs as part of the family or as heirs of late Kuldeep Saha.

- 10.** Mr. Mukherjee submitted that the plaintiff No.1 being the wife of the deceased Kuldeep Saha was all along a housewife and did not have any source of income and after the death of her husband the plaintiff No.1 is solely responsible for herself and her daughter, plaintiff No. 2.
- 11.** Mr. Mukherjee submitted that the plaintiff No.1 is in dire need of money to meet their expenses for their livelihood and requested the defendant No.1 for making over the amount which the husband of the plaintiff No.1 had deposited in the joint account which the husband of the plaintiff No.1 used to maintain with the defendant No.1 but by a letter dated October 10, 2018, the defendant No.1 informed the plaintiff that the deceased Kuldeep Saha had left behind a Will dealing with all his movable and immovable property and refused to make any payment to the plaintiff No.1.
- 12.** Mr. Mukherjee submitted that by Advocate letter dated October 15, 2018 questioned the defendant No.1 as to why the alleged executor shying away from disclosing the alleged Will, if any to the plaintiffs. The Standard Chartered Bank also refused to disburse the share of rent of Kuldeep Saha to the plaintiffs on the ground that they had a specific instruction from the defendants that Mr. Sujit Guin, claiming to be executor of the alleged Will left behind by the deceased Kuldeep Saha and the same is pending for adjudication.



- 13.** Mr. Mukherjee submitted that the defendants threatened the plaintiffs of dispossession from the Salt Lake property where the plaintiffs presently resides and thus the plaintiffs have filed a Title Suit No. 1082 of 2018 before the learned Civil Judge (Senior Division) 2nd Court at Barasat and in the said suit the plaintiffs have also obtained an ad interim Order of Injunction.
- 14.** Mr. Mukherjee submitted that as the defendants did not allow amicable partition amongst themselves, having no other alternative the plaintiffs have filed the present suit for partition. He further submits that the alleged Will is forged and manufactured by the defendants with an intention to grab the share of the plaintiffs. He further submits that the plaintiffs are not aware regarding the contents of the alleged Will as in spite of the request made by the plaintiff the copy of the Will was not provided to the plaintiffs.
- 15.** Mr. Mukherjee submitted that there is no bar for proceeding with the present suit during the pendency of the PLA No. 175 of 2022 as in the said application he has alleged to have prayed for grant of probate. The Probate Court cannot decide the title of the parties and there is no bar to file suit for declaration of title in spite of pending probate application. He submits that probate proceeding and the partition suit stands on different footing and it cannot be said that the decision in one shall have impact on the other.
- 16.** Mr. Mukherjee relied upon the following judgments:



- (i) 2005 SCC OnLine Cal 288 (Asoke Kumar Himmatsinghka -vs- Rajendra Kumar Himmatsinghka).
- (ii) 2017 SCC Online Cal 15483 (Smt. Menoka alias Mina Ghosh (Chowdhury) and Others -vs- Durga Shankar Ghosh & Ors.).
- (iii) (2009) 13 SCC 179 (Maddineni Koteswara Rao -vs- Maddineni Bhaskara Rao & Another).

17. Heard the learned Counsels for the respective parties, perused the materials on record and the judgments relied by the parties.

18. The question which arises in the present application is whether the trial of the suit for partition should be stayed till the disposal of the probate proceeding.

19. Section 10 of the Code of Civil Procedure, 1908 reads as follows:

“10. Stay of suit. - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India have jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.- The pendency of a suit in a foreign court does not preclude the Courts in [India] from trying a suit founded on the same cause of action.”

20. In the case reported in **(2005) 2 SCC 256 (National Institute of Mental Health and Neuro Sciences – versus- C. Rameshwara)** held that :



“8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as resjudicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key 8 words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject matter in both the proceedings is identical.”

- 21.** In the case reported in **(2018)1 Cal LJ 647 (VCK Share and Stock Broking Services Limited vs. ICICI Bank)** held that although the parties are same, apparent look of the prayers in two complaints seems to be identical but they are not substantially the same. Although, the parties are same in the present case, but within the scope of Section 10 Court has to arrive at a satisfaction that the trial of the any suit can only be stayed when the matter in issue in the said suit is directly and substantially in issue in the previously instituted suit of 1999 between the same parties.



22. In the present suit, the plaintiffs have prayed for a decree for partition and allied prayers. The defendant has prayed for stay of the suit filed by the plaintiffs on the ground of pendency of PLA No. 175 of 2022 for grant of probate but the defendants have neither enclosed the copy of probate application nor have disclosed the alleged Will.

23. In the case of **Asoke Kumar Himmatsinghka (Supra)**, the Coordinate Bench of this Court held that :

- 11.** *The moot question involved in this application is whether the learned Trial Judge was justified in staying of all further proceedings in the partition suit on account of pendency of the probate proceeding in respect of the last Will and testament of the said Siriya Debi Himmatsinghka?*
- 12.** *The stay has been granted in exercise of the power of the Court under section 151 of the Code of Civil Procedure. No party has a right to insist on the Court to exercise its inherent jurisdiction. The reliance placed by the learned Judge in Amar Chandra Roy (supra) is misplaced. The Division Bench in the said decision has not laid down any general proposition of law that whenever a probate proceeding is pending, the suit shall be stayed. In my view, there cannot be any fixed jacket formula that as the probate proceeding in respect of the Will of one of the parties to the suit is pending, the suit shall remain stayed. The power to grant stay is to be exercised by the Court in exceptional circumstances for ends of justice and to prevent abuse of the process of the Court.*
- 16.** *If the order granting stay is continued, the plaintiff shall suffer irreparable loss and injury. We do not know when the probate proceeding would ??? concluded. It is not known whether it is a contentious cause or not. It cannot ??? ruled out that in order to put the plaintiff, who is undisputedly 50% owner of the premises, into unnecessary harassments the natural heirs and*



legal representatives of the said Shreemati Siriya Debi Himmatsinghka and the legatees named in the Will are prolonging the probate proceeding in collusion amongst themselves. It will be sheer injustice if the plaintiff is asked to wait to ??? his legitimate share because his co-sharers are litigating amongst themselves.

17. *Therefore, there was no justification in staying of all further proceedings in the suit. In the event the Will is probated before the disposal of the suit, the executor alone should be made to represent the estate of the deceased.*

24. In the case of **Smt. Menoka alias Mina Ghosh (Supra)**, the another

Coordinate Bench of this Court held that :

“10. *On the conspectus of the aforesaid facts and the submission advanced by the respective parties, the moot question which arises in the instant revisional application is whether the trial of the suit for partition should be stayed till the disposal of the revocation application.*

11. *It is no longer res integra that the object underlying Section 10 is to prevent the Courts of concurrent jurisdiction to simultaneously trying two parallel proceedings in respect of the same matter in issue in order to avoid the conflicting findings and the decisions on the issues which are directly and substantially an issue in the previous proceeding. It is manifest that the question of suit being barred is not within Section 10 of the Code but only the trial. Broadly speaking there are three essential conditions under the aforesaid provision,*

firstly, the matter in issue in the second suit should be directly and substantially in issue in the first suit;

secondly, the parties in the second suit are same or litigating under the same title; and

thirdly, the Court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit.



13. *As indicated above the Court should not try the later suit during the pendency of an earlier suit if there are the common issue or issues in both the suits in order to avoid the conflicting decisions to operate in the field simultaneously. It is, therefore, a duty of the Court to find out whether the issues in the first suit/proceeding before the Court has direct bearing or impact on the issues in the later suit or proceeding. If the answer is found affirmative, it is mandatory on the Court to stay the trial of the later suit. Where the answer is negative, there is no other option left to the Court to dismiss the application for stay of trial of the later suit.*

14. *The Probate Court is a Court of conscience having limited jurisdiction on the genuinity and the authenticity of the Will. The Probate Court cannot decide the title of the parties and there is no fetter on the part of the parties to approach the Civil Court for declaration of title irrespective of the fact that the probate has been granted. It is axiomatic to record that the issues in the probate proceeding is not relatable or referable to the title of the parties. The probate proceeding as well as the partition suit stands on a different pedestal and it would be wrong to say that the decision in one shall have impact on the other. Mere involvement of the identical properties in both the proceedings is not the sole factor under Section 10 of the Code.”*

25. In the present case admittedly, the plaintiff has filed the suit in the year 2020 and subsequently in the year 2022, one Sujit Guin alleged to have filed an application being PLA No. 175 of 2022 for grant of probate. It was only informed to the plaintiffs that the deceased Kuldeep Saha had executed a Will in favour of one Sujit Guin but even on request made by the plaintiff copy of the Will was not supplied to the plaintiff. Mr. Sujit Guin has filed an application for stay of the present suit.



- 26.** In the case of ***Smt. Menoka alias Mina Ghosh (Supra)***, the Hon'ble Court has held that probate Court is a Court of conscience having limited jurisdiction on the genuinity and the authenticity of the Will and the Probate Court cannot decide the title of the parties and there is no fetter on the part of the parties to approach the Civil Court for declaration of title irrespective of the fact that the probate has been granted.
- 27.** In view of the above, this Court did not find any justification to stay the proceeding of C.S No. 96 of 2020 (Sangita Saha and Another -vs- Jaya Saha and Another).
- 28.** Accordingly, **G.A No. 3 of 2022** is thus **dismissed**.

(Krishna Rao, J.)