

Calcutta High Court

HON'BLE JUDGE(S): APURBA SINHA RAY, J

**IN THE GOODS OF SRI DHIRENDRA MOHAN OJHA (DEC.)
V.
MUKTI OJHA (KUMAR), MALA OJHA(KUNDU) DIPTI OJHA**

TS - 1 of 2022, decided on 08/12/2022

Civil P.C. (5 of 1908) , O.39 R.1, O.39 R.2— Temporary injunction - Restraining parties from preventing or obstructing entry of legal heirs of deceased into properties under Will - Probate proceeding was pending and has not reached to its finality - Until propounder proves that Will was executed by testator after understanding consequences thereof and he was in sound state of disposing mind at time of execution of alleged Will, plaintiff or, even caveatrixs, cannot claim exclusive rights over respective properties allegedly settled by testator - Therefore parties cannot restrict or prohibit any of legal heirs of deceased to enter into properties under Will on strength of contents of Will till it is duly probated - Considering all aspects, prayer for temporary injunction disposed of restraining both parties from preventing or obstructing entry of legal heirs of deceased into properties under Will till completion of probate proceedings subject to conditions.

(Para 6, 7)

Case Referred :

AIR 2020 SC 2614 : AIROnline 2020 SC 544
AIROnline 1996 SC 55
AIR 1962 SC 1471
AIR 1959 SC 443

Chronological Paras

Para No.(2)
Para No.(2)
Para No.(1, 5)
Para No.(2)

Name of Advocates

Chandradoy Roy, Arun Goswami, Bratin Kumar Dey, Ms. Anjana Banerji for Petitioner;
Jayanta Sengupta, Arnab Dutt,ms. Labani Dey for Respondent.

1. **ORDER:-**The temporary injunction petition filed at the instance of the caveatrixs, inter alia, contends that the caveatrixs, being the daughters of Late Dhirendra Mohan Ojha, the testator, are being denied entry in their paternal home by the propounder of the alleged Will. The learned Counsel has

pointed out that until the probate is granted in favour of the propounder of the Will by a Competent Court of Law, he cannot resist/ prevent caveatrixs from entering into the house of their deceased father. In this regard the learned Counsel has drawn the attention of this Court to the provisions as laid down in Section 213 of Indian Succession Act, 1925. Specific paras of the impugned Will were referred to by the learned Counsel of the caveatrixs to show the inconsistencies and incongruities persisted therein. According to the learned Advocate of the caveatrixs, these go to show that the testator was not allowed to act freely or to act according to his conscience. The learned Counsel has also referred to a decision reported in **AIR 1962 SC 1471** in support of his contention.

2. The learned Counsel of the plaintiff, on the other hand, submits that as the testator was in good health at the time of making the Will, there is no question of making false averments in the impugned Will. The learned Counsel has also submitted that a Will can be challenged only if there are suspicious circumstances or incomplete attestation from the side of attesting witnesses. He has referred to the decisions reported in **AIR 1959 SC 443**, (1996) 9 SCC 324 : (**AIR Online 1996 SC 55**), (2021) 11 SCC 209 : (**AIR 2020 SC 2614**). The learned Counsel has also drawn the attention of this court to the provisions laid down in sections 63, 67, 68 and 84 of Indian Succession Act, 1925. The learned Counsel has categorically stated that in Section 84 of the Indian Succession Act, 1925, it is provided that where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred. In his opinion, if there are contradictory statements in the impugned Will, then the statement which is former, shall prevail over the latter statement. The learned Counsel has also pointed out if the temporary injunction petition filed by the caveatrixs is allowed then the plaintiff should also be allowed to visit the other properties of his deceased father which are being occupied by some of his sisters.

3. After going through the judicial decisions, provisions of law as well as after taking into consideration the oral submission of the Counsels of the parties, I can say at this stage that the instant probate proceeding is pending and does not reach to its finality. Until the propounder proves that the Will was executed by the

testator after understanding the consequences thereof and he was in sound state of disposing mind at the time of execution of the alleged Will, the plaintiff or, even the caveatrix, cannot claim exclusive rights over the respective properties which are, by virtue of the contents of the Will, allegedly settled by the testator in their favour. In other words, the stage has not become ripen to allow the respective impugned properties to be used exclusively by the respective parties of the instant probate proceeding during its pendency.

4. Though the judicial decisions referred by the plaintiff remind us the conditions of proving a Will executed by a testator, but the stage of this proceeding is far away from the stage of considering the said Will on the strength of evidences.

5. The case law reported in **AIR 1962 Supreme Court 1471** cited from the side of the caveatrix has interpreted the provisions of Section 213 of Indian Succession Act, 1925 and the said decision postulates that Section 213 of the said Act creates a bar to the establishment of any right under Will by an executor or a legatee unless probate or letters of administration of the Will have been obtained. It has been further held that it is immaterial whether the right under the Will is claimed as a plaintiff or as a defendant; in either case Section 213 will be a bar to any right being claimed by a person under a Will whether as a plaintiff or as a defendant unless probate or letters of administration of the Will have been obtained.

6. Therefore, the parties to the instant proceeding cannot restrict or prohibit any of the legal heirs of the deceased to enter into the properties under Will on the strength of the contents of the Will till it is duly probated in accordance with law.

7. Considering all aspects, the prayer for temporary injunction being GA No. 2 of 2022 is disposed of by restraining both the parties from preventing or obstructing the entry of the legal heirs of deceased Dharendra Mohan Ojha into the properties under the Will till completion of the instant probate proceeding, subject to conditions that the parties shall strictly adhere to the principles of decency, morality, mutual obligation, and reciprocity while visiting, entering into the said properties. However, the parties are further directed not to remove

any movable articles or items from the said properties without permission of this court. Defendants have already filed written objection supported by affidavit. Let the matter be fixed for framing of issues on 16.12.2022. The parties are directed to submit suggested issues.

8. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

Order Accordingly