

(1910) 07 CAL CK 0028
In the Calcutta High Court

C.E. Grey-Official Trustee

APPELLANT

Vs

Charusila Dasi

RESPONDENT

Date of Decision : 26-07-1910

Acts Referred:

Official Trustees Act, 1913 — Section 8

Citation : 7 Ind. Cas. 247

Hon'ble Judges : Lawrence Jenkins, C.J.; Woodroffe, J

Bench : Division Bench

Judgement

Lawrence Jenkins, C.J.—Appeals Nos. 39 and 40 of 910 relate to the estate of one Aukhoy Kumar Ghose, who died on the 23rd of November 1909 having made a Will on the 11th of May 1909. The genuineness of this Will has not been called in question, and the whole of this litigation, and I think I may justly describe it as unfortunate and inopportune litigation, is concerned with the question whether or not the Official Trustee is entitled to probate and whether the widow of the testator, who in the circumstances is his nearest heir, is entitled to Letters of Administration with the Will annexed. Mr. Justice Fletcher has decided that the Official Trustee is not entitled to probate, and he has granted Letters of Administration to the widow: and, it is from his decision that these two appeals are preferred.

2. One cannot help being struck with what at the first blush at any rate would appear to be the obstacles repeatedly placed in the way of the widow's establishing her position but in the view I take, it is unnecessary to discuss the merits or demerits of this matter, because I am clear that the Official Trustee has no right to probate. To begin with, I read the letters contained in the affidavit and the action of the Official Trustee as a clear-renunciation on his part. To read the letters otherwise and to give a different interpretation to his conduct would be, I think, little short of imputing bad faith on him. That I do not propose to do. The matter might be allowed to rest there because that would dispose of the Official Trustee, but I think, in the circumstances, it is desirable to proceed to the

further question as to whether or not the Official Trustee is entitled, by virtue of his office and in his character as Official Trustee and in the name of the official Trustee, to have a grant of probate. I put the proposition in that form, because it cannot be seriously contended and indeed was not seriously contended that there was any desire on the part of the testator to single out the individual incumbent in the office to be his executor. I feel no doubt that the testator's idea was to appoint the Official Trustee as such, and by that I mean the Official Trustee by virtue of his office and by the name of his office and in no other sense. Now, was it open to the testator to appoint the Official Trustee as constituted by Act XVII of 1864 as executor of his Will? In my opinion it was not. The Act itself appears to afford the clearest answer on this point. It is described as an Act to constitute an office of Official Trustee, and it opens with a preamble in which it is said: "It is expedient to amend the law relating to Official Trustee and to constitute an office of Official Trustee." The office is created for specific and definite purposes:-- It is the creature of the Act, and the incumbent of the office as such can only have such powers as are expressly or impliedly vested in him by the Act to which he owes his existence. Section 8 and Section 10 indicate the conditions under which in ordinary circumstances the Official Trustee may become trustee of property. It is manifest that an application for probate does not come within either of those provisions. Then we have a supplemental provision in Section 32, which indicates how, in the particular event there set forth, an executor or administrator may pay to the Official Trustee the legacy or share of an infant or a lunatic, but that can only be done subject to certain conditions which clearly show that it is the scheme of the Act that the Official Trustee as such should not have the wide and unlimited powers that the argument addressed to us on his behalf would suggest. Then again, if the Act be examined, it will be seen that without exception the whole of its expressions are limited to the Official Trustee as a trustee and the property, over which he is to have control, is regarded as trust property in the ordinary, proper and accepted sense of that term. There is in the Act, as I read it, no suggestion of the possibility of the Official Trustee as such being entitled to probate or letters of administration. Without going in detail through all the provisions of the Act, it is enough to say that it contains careful and elaborate provisions with a view to ensuring that the Official Trustee in the performance of his duties should be under vigilant and proper control. He has to furnish accounts which have to be examined; he has to keep books of account; he has to submit his account to auditors, and for very good reasons. Where the Legislature creates an officer of this kind, it is but right and proper that it should take every precaution to ensure that no discredit should attach to the office. But it is conceded that if the Official Trustee is entitled to probate and administration, none of these precautions would be applicable to him in his character of executor or administrator under the terms of the Act; the very terms of the Act would be inapplicable to the position and the dealing of the Official Trustee as executor or administrator. Therefore, it seems to me that not only is there no express provision in favour of the power to grant probate or letters of administration to the Official Trustee, but

the whole scheme of the Act is opposed to the view that they can properly be granted to him.

3. It is unnecessary to refer to the oases or to deal seriously with the argument that the case of *Ashbury Railway Carriage and Iran Co. v. Riche* L.R. 7 H.L. 653 : 44 L.J. Ex. 185 : 33 L.T. 451 : 24 W.R. 794 does not decide that which the House of Lords itself has held that it decided. The conclusion then to which I come is that the Official Trustee holds a public office created, regulated and defined by the Act and that in his official capacity his powers are limited to those expressly or impliedly vested in him by the Act. I need not deal with the other difficulties that would arise in the particular circumstances of this case, having regard to the position of Mr. Grey at the time when the Will was made. It is sufficient for me, in answer to the broad question whether or not the Official Trustee is entitled to be executor or administrator, to hold that he is not so entitled, and in this view the decree of Mr. Justice Fletcher should be confirmed and this appeal dismissed with costs.

4. It has been suggested to us that Mr. Justice Fletcher's order as to costs was harsh. I will say no more than that I see no reason for differing from him as to the order he has made with regard to the costs before him.

Woodroffe, J.

5. I agree.