

(1930) 07 CAL CK 0005
In the Calcutta High Court

Elizabeth Anna Vanqulin and Another	APPELLANT
Vs	
Official Trustee of Bengal and Another	RESPONDENT

Date of Decision : 15-07-1930

Acts Referred:

Succession Act, 1925 — Section 118

Citation : AIR 1931 Cal 138

Hon'ble Judges : Rankin, C.J;C.C. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—In this case it, appears that the testator's will was admitted to probate on 23rd January 1930, he having died on 29th November 1929. It further appears that, prior to the will in question, a previous will had been executed by the testator and had been deposited with the Registrar of Assurances in Calcutta with a view to Section 118, Succession Act, there being certain substantial legacies to charity contained therein. In like manner, the will which was admitted to probate was deposited with the Registrar of Assurances and it appears that, at the time it was made and deposited, the previous will was withdrawn from the custody of the Registrar. It further appears that the previous will was destroyed by the testator. In the later will, there is an express clause revoking all former testamentary instruments. Some of the legacies other than legacies to charity are different if one compares the two wills.

2. We find, for example, in the second will, that certain legacies remain unaltered and certain legacies have been increased. As regards charitable legacies, certain of them have been reduced and certain of them remain unaltered. The testator, according to the case of the applicants before the learned Judge, had not made his will in such a way as to comply with the provisions of Section 118, Succession Act, that is to say, the will at the time of his death had not been executed for a period of 12 months. In that view, the applicants took out an originating summons and they made as a party the executor, namely the Official Trustee, and they asked the Court's opinion whether the bequests to charitable uses were

bad and whether the bequest of the residue to charitable uses was bad and void. On that, it appears that the Official Trustee appeared before the Court and, although the Probate Court has granted probate of the last will only as being the true testamentary disposition of the testator, it is sought upon this originating summons to make a case to the effect that, as the dispositions to religious and charitable objects in the second will were bad u/s 118, Succession Act, the revocation of the earlier will was dependent conditional revocation and therefore either that the charitable bequests in the former will must take effect or else that the whole of the: former will must take effect. I have not been able to ascertain exactly what the contention was.

3. The learned Judge on this originating summons entered into the question whether this will, which had been admitted to probate, was the man's will or not, or whether it, together with something else was the man's will, and he came to the conclusion that the will which had been revoked was revoked only by a dependent conditional revocation and he applied the consequences of that finding to the circumstances of the case. So far as I can make out, he took the view that it did not very much matter whether the second will was hit by Section 118, Succession Act, or not, because he said that the charitable bequests in it did not revoke pro tanto the charitable bequests made in the first document but, so far as they decreased the gifts to charity made in the first document, they did not offend against Section 118.

4. Now, before us some considerable discussion has taken place upon the question whether the learned Judge was really right in the circumstances of this case,, having regard to the fact that there was an express clause of revocation, in applying the doctrine at all and as to whether the learned Judge succeeded in drawing the right consequence even supposing, that the doctrine had to be applied. It is quite certain that the learned Judge himself appreciated that he was applying the doctrine in circumstances in which it had never been applied before so far as the authorities go. But a question which seems to us to be of very considerable importance is the question whether the learned Judge on an originating summons had any right to entertain or decide this question. I am clearly of opinion that he had none. The question, what is the man's will is a question to be decided in the testamentary jurisdiction of the Court, just as in England it is to be decided in the Probate Division of the High Court. It is not a question that can be decided incidentally according as the dispute between the parties happens to arise in the Small Cause Court in Calcutta or the Munsif's Court in Bhagalpur or somewhere else. It has to be dealt with as a matter in respect of which the ultimate finding of the Court is a finding in ram binding the whole world. When you know what a man's will is, there is plenty of time to begin "to construe it. In the present case, the applicants very naturally assumed that the Official Trustee agreed that the will which he propounded, and which the Court accepted, was the will of the testator and took out an originating summons asking certain questions under that. For reasons which I do not at all appreciate, instead of leaving it to the charities concerned, the Official Trustee took upon

himself to contest the case made by the residuary legatees. Why he should have done that, I do not know. The charities so far as I can see, have not even been served with the summons in this case. The order of the learned Judge is this:

It is declared that the two testamentary dispositions dated respectively the fifth day of March on thousand nine hundred and twenty eight and the twenty-first day of September one thousand nine hundred and twenty nine mentioned in the affidavit of Clement Charles Even not together contain the will of Johannes Appear deceased and that the said second testamentary document should be treated as a codicil to the said first testamentary document.

5. If a Judge on an originating summons can do that, I suppose any other Judge can do the like in any other case. Pro-bato practice and machinery break down altogether. The order then goes on to say:

It is further declared that the charitable bequests contained in the said first testamentary document were not revoked by the said second testamentary document, but that the amounts thereof were reduced to the extent indicated in the said second testamentary document. And it is further declared that the bequests contained in the said first testamentary document other than the charitable bequests were revoked by the said second testamentary document.

6. Then it is ordered that

the Official Trustee of Bengal is entitled to apply for probate of the said first testamentary document and the said second testamentary document or to apply for probate of a copy thereof.

7. It seems to me that it must be wrong to decide the question whether a certain document should be admitted to probate upon an originating summons and then to declare that the executor is entitled to apply to the Probate Court. This is a matter for the Probate Court which may well take a very different view. It is not until the Probate Court has decided the matter finally that it is given to anyone to know what the dispositions made by the testator are. I understand that the Official Trustee is making an application to the Probate Court to get probate of the first will as well as of the second. I do not desire to say anything to stop it. But it must be clearly understood that he is doing that on his own responsibility. In my judgment, the whole order of the learned Judge should be set aside and the case must be sent back to the original side to be dealt with again, provided always that it is not to be dealt with until the result has been achieved in any application that is being made to the Probate Court as regards the first testamentary document. When that matter has been settled one way or another, no doubt this matter will come again to some learned Judge to be dealt with. It will be in the discretion however of the learned Judge of the original side to limit a time within which he will proceed with the application, if the application before the Probate Court is unduly delayed.

8. The question remains then what to do with the costs of the appellants, the

original applicants before the learned Judge. I have the greatest difficulty in making up my mind that it is not our duty to make the Official Trustee pay those costs personally in this case. It is quite clear that the costs have all been thrown away in this very simple matter. I am of opinion that the costs of the applicants before the learned Judge and before us must be paid out of the estate. So also the costs of the Official Trustee and of the defendant-respondent Mrs. Ainsley. There are some other reserved costs which will follow the same order.

C.C. Ghose, J.

9. I agree.