
(1930) 07 AHC CK 0017
In the Allahabad High Court

Gopi Rai	Vs	APPELLANT
Baij Nath Rai and Others		RESPONDENT

Date of Decision : 01-07-1930

Acts Referred:

Citation : AIR 1930 All 840 : (1931) ILR (All) 97

Hon'ble Judges : Sulaiman, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Sulaiman, J.—This is an appeal by Gopi Rai, one of the objectors to an application for the grant of a probate. Baij Nath Rai, who claimed to be the executor under a will, dated 29th January 1928, executed by Nakched Rai, who admittedly died on 15th April 1923, applied for the grant of probate to him. Notices were issued to a large number of persons, many of whom were beneficiaries under the alleged will. Three of these persons only entered the caveat but the beneficiaries did not put in an appearance. An application was made on behalf of Baij Nath, the applicant, and six other persons to refer the dispute relating to the genuineness of this document to an arbitrator. The learned Judge allowed this application and referred the matter to arbitration, although the other beneficiaries had not joined in the application. The agreement of reference to arbitration permitted the arbitrator to import his own personal knowledge and decide the dispute on its basis. The arbitrator delivered his award basing his conclusion on his personal knowledge also and holding that the will had been proved to be a genuine document. Objections were filed to this award by some of the objectors, including Gopi Rai, but no objection was taken that the reference itself was illegal. The learned Judge after considering the objections on merits overruled them and passed a decree in terms of the award. Gopi Rai now appeals from the order granting the probate, and on his behalf it is urged that the reference was wholly irregular and illegal.

2. It seems to us that the learned Judge had no jurisdiction to allow the dispute

relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration of an arbitrator. The order granting probate is a judgment in rem and, so long as it is not revoked, is operative against the world. Before such an order is passed the Court has got to be satisfied in its own mind that the will is a genuine document and that probate ought to be granted. It cannot delegate its proper functions to a private individual and decide the point through him. If such a course were permitted, a door for fraud and collusion would be opened which it is against public policy to permit.

3. The point is not *res integra* but it is covered by authority. We may refer to the case of *Ghella, Bhai v. Nandu Bai* [1897] 21 Bom 335 in which Farran, C.J. at p. 342 remarked that the Court had no authority to refer the factum of the will to arbitration and that clearly it would not refer such a matter in which there were beneficiaries interested whose consent had not been obtained, that the probate Court could not grant probate on the vicarious finding of an arbitrator but must itself be satisfied by admissible evidence that the will was the will of the testator and that the relevant provisions of the CPC were not applicable to probate proceedings, and, on the other hand, the provisions of the Probate Act preclude the possibility of a Judge referring the question of the execution of a will to an arbitrator, particularly if all the beneficiaries had not appeared before him and consented to that course, even which was doubtful. We agree with these observations and hold that the District Judge could not act upon the award which was the result of a reference to arbitration, without even the consent of many of the beneficiaries. The same principle has been applied to compromises regarding the genuineness of the will in probate proceedings: vide *Manmohini Guha v. Banga Chandra Das* [1904] 31 Cal. 357 and *Sarda Kanta Das v. Gobinda Mohan Das* [1910] 6 IC 912. We have therefore both on principle and on authority, no doubt whatsoever in our minds that the order of the Judge was quite illegal.

4. The only point seriously urged on behalf of the respondents is that inasmuch as Gopi Rai had himself agreed to the reference and never objected to the award on the ground of illegality, he is estopped from raising this point in appeal. We cannot hold that there is any estoppel against Gopi Rai on this question of jurisdiction. That is a matter which we can take into account only when ordering costs. We accordingly allow this appeal and setting aside the order of the Court below granting the probate, send the case back to that Court with directions to restore it to its original number on the file and dispose of it according to law. In view of the fact that this objection has been taken for the first time in appeal before us, we direct that the parties should bear the costs of the proceedings incurred so far.