
(1910) 07 CAL CK 0053
In the Calcutta High Court

Grey	Vs	APPELLANT
Charusila Dasi		RESPONDENT

Date of Decision : 26-07-1910

Acts Referred:

Citation : (1911) ILR (Cal) 53

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

Bench : Division Bench

Judgement

Lawrence H. Jenkins, C.J.—Appeal No. 39 of 1910 relates to the estate of one Akshoy Kumar Ghose who died on the 23rd of November, 1909, having made a will of the 11th of May, 1909. The genuineness of this will has not been called in question, and the whole of this 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 this appeal is preferred.

2. 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 to 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 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 of 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 pre-amble 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 lie 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 events 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 accounts, he has to submit his account to creditors. 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 dealings 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 cases or to deal seriously with the argument that the case of *Ashbury Railway Carriage and Iron, Co. v. Riche* (1875) L.R. 7 H.L. 653, 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 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.