
(1914) 01 BOM CK 0007
In the Bombay High Court
Case No : Second Appeal No. 110 of 1912

Kishorbhai Revadas

APPELLANT

Vs

Ranchhodia Dhulia

RESPONDENT

Date of Decision : 27-01-1914

Acts Referred:

Evidence Act, 1872 — Section 44

Citation : AIR 1914 Bom 114 : (1914) 16 BOMLR 459 : 13 Ind. Cas. 37

Hon'ble Judges : Batchelor, J; Basil Scott, J

Bench : Division Bench

Judgement

Basil Scott, Kt., C.J.—This suit was instituted by Kishorbhai Revadas, the executor who had obtained probate of the will of Jijibhai Kasandas, to recover from the first defendant Rs. 144 as rent of certain fields occupied by him as yearly tenant, and possession of those fields.

2. The defence of the first defendant was that the deceased Jijibhai had asked him to pay the rent to his nephew Jivabhai, who was the second defendant in the case, and the second defendant Jivabhai contended that the deceased made no will, and that the will proved was fabrication.

3. The second defendant prior to the institution of this suit on the 2nd of March 1905 made an application to the District Court for revocation of the probate granted to the plaintiff upon the ground that the will was a forgery, and that he (the second defendant) had been prepared to prove it in the probate proceedings, but at the last moment the plaintiff had bought him off, and that a mutual arrangement had been effected whereby the second defendant agreed not to cross-examine the plaintiff's witnesses and to call evidence, and thus facilitated the grant of probate to the plaintiff who would otherwise have been prosecuted for forgery on the strength of the Mamlatdar's report, and in consideration of the withdrawal of his opposition the plaintiff agreed to restore the property of the deceased to him (the second defendant), or to pay the equivalent in cash directly the probate had been granted, but after the order had

been passed the plaintiff declined to carry out his part of the arrangement and thus committed a fraud on the one hand upon the Court, and on the other on him (the 2nd defendant), and that, therefore, the probate should be revoked. The application for revocation was disposed of by the District Court on the ground that the second defendant on his own showing was a party to a fraud upon the Court, that he had not come with clean hands, and was not therefore entitled to the relief sought.

4. The first defendant, as I have stated, claims to be entitled to pay rent for the property to the second defendant. He, therefore, claims under him since the death of the testator. The second defendant in this suit has taken advantage of the first defendant claiming under him to put forward the same Kishokbhai grounds as he put forward in the application for revocation, and the Subordinate Judge who tried the case in the first instance, and the Subordinate Judge, with appellate powers, who tried the case in appeal having gone into the questions of fraud, which the District Court declined to entertain upon the revocation application, have found that the will was a forgery, and that the probate granted by the District Court is of no avail to enable the plaintiff to recover from the first defendant the property of the deceased.

5. This investigation was permitted in the lower Courts upon the strength of Section 44 of the Evidence Act which states that: " Any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under Sections 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

6. Now the party who seeks to prove the fraud and collusion vitiating the decree of the Probate Court, under which probate was granted to the plaintiff, is the second defendant, and the second defendant has already raised that question in the only Court which was competent to decide it, namely, the District Court, for the Subordinate Judges who tried the present case have no jurisdiction in probate matters, and the Court competent to decide it dismissed the application, for the reasons which I have already slated. It was an application in the nature of a suit as all contested probate proceedings are, and the decision could have been appealed from by the second defendant, and if the learned District Judge was held to be wrong in rejecting the application upon the grounds upon which he had rejected it the result would have been that those allegations of fraud would have been investigated by a Court competent to give effect to its findings. The second defendant, therefore, is, we think barred by the decision of the District Court in the revocation matter from raising again the same question in the Court of the Subordinate Judge.

7. As regards the first defendant, he does not raise these questions by his pleading, although he has made common-cause with the second defendant in his defence. As regards him, it is not disputed that he is in possession of property forming part of the deceased, and the plaintiff seeks to recover possession of

that property for the estate as its representative. The defendant does not dispute that he is liable to pay rent for his occupation at a rate which is not exceeded in the demand in this suit.

8. Now, where the demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate. What would have been the result of this common defence if it had been put forward in the District Court is a question which is not free from difficulty and which we have not to decide in the present case. But we think it is clear that in the Subordinate Judge's Court, which has no jurisdiction to deal with the question of probate, the title of the plaintiff was conclusively proved by the production of the probate, and it was no valid defence on the part of the first defendant to join in the allegation of the second defendant that the will was a forgery, and that the probate had been obtained by fraud and deception.

9. Section 59 of the Probate Act says that "probate shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted." Therefore, the first defendant in complying with the demands of the plaintiff would have been fully indemnified as against all persons entitled to share in the estate of the deceased.

10. The English cases afford illustrations of the rule stated in Section 59 of the Probate Act. *Allen v. Dundas* (1789) 3 T.R. 125 decides that: " payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal Courts."

11. In *Attorney General v. Partington* (1864) 3 H.& C. 193. Mr. Justice Willes says:-" it is only necessary to bear in mind the nature of such a grant as the act of a Court of sole jurisdiction pronouncing as to personal property to the exclusion of all other Courts,...upon the question of testacy and intestacy, and upon the right to receive and distribute the effects of the deceased in the event of intestacy, whether total or partial. Without the constat of such a Court no other Court can take notice of the rights of representations to personal property; and when such Court has by the grant of probate or letters of administration established the right, no other Court can permit it to gainsayed." The last words of that quotation seem to us to be applicable to the case of a grant of probate by the District Court, which it is attempted to challenge in the Court of a Subordinate Judge. In *In re Ivory* (1878) 10 CH.D. 372 letters of administration of the estate of an intestate were granted ex-parte to the defendant, as " his natural and lawful brother of the half blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the

administration of the estate, alleging that the defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction. It was held by Lush, J. " that the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that the defendant was one of the next of kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled."

12. Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any locus stand in applying to the District Court for revocation of the probate-we need not decide. As regards the second defendant, although he had a locus standi to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit. He will be completely indemnified-by paying and delivering over the property to the plaintiff, and it is a pity that under the circumstances he should have thought fit to make common cause with the second defendant.

13. We reverse the decree of the lower Court and pass a decree for the sum claimed, and for possession of the property in suit against the first defendant, with costs throughout payable by both defendants.