

(1939) 08 CAL CK 0019
In the Calcutta High Court

Rai Br. Pannalal and Others	Vs	APPELLANT
Lala Hansraj Gupta and Others		RESPONDENT

Date of Decision : 01-08-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Succession Act, 1925 — Section 63

Citation : AIR 1940 Cal 236

Hon'ble Judges : Panckridge, J

Bench : Division Bench

Judgement

Panckridge, J.—This suit has been set down for the trial of certain issues settled by McNair J. on 5th December 1938. The facts can be summarized as follows : One Lala Raghumull Khandelwal, a resident of Delhi, to whom I shall refer as "the testator," died without male issue on 5th September 1926. More than twelve years prior to his death, on 6th April 1914, he had executed a will, whereby he appointed his friend Rai Sahib Kedar Nath and his nephew Deen Doyal his executors. As to the residue of his estate, moveable and immovable, he directed that if he died without male issue it should be applied by his executors for the purpose of education of boys and girls belonging to the Hindu community, the Arya Samaj having preference in such manner and under conditions as to his executors shall seem proper. The will was deposited for safe custody with the firm of Messrs. B.N. Basu & Co., the well-known attorneys. On the day before his death, that is to say on 4th September 1926, the testator executed another will. He appointed as his executors his son-in-law Hansraj, his two nephews Dinonath and Gordhan Das, and one Gopal Das Modi. He gave power to his wife Bhagwati Debi to appoint herself or another person as fifth executor and she subsequently exercised this power by appointing herself executrix. By this will the testator purported to revoke all wills and testamentary dispositions theretofore made by him.

2. The second will does not contain a bequest for the purpose of the education of Hindu boys and girls, such as is found in the first will. On 23rd September 1926,

the executors and executrix of the second will applied for probate to this Court in its testamentary and intestate jurisdiction. Caveats were entered by various members of the testator's family and also by Kedar Nath, the executor of the first will. All these caveats were subsequently withdrawn and probate of the second will was granted on 10th January 1927. The executors subsequently fell out among themselves and in July 1929, the executor Gopal Das filed an administration suit. The Official Receiver was appointed receiver of the testator's estate on 16th June 1931. On 11th May 1937, the plaintiffs obtained leave under Order 1, Rule 8(1), Civil P.C., as members of the Hindu community to sue on behalf of all persons including boys and girls belonging to the community, and also to make the Official Receiver a defendant. On 16th May 1937 this suit was instituted.

3. The only other fact that requires mention is that on 18th May 1937, McNair J. dismissed an application made in the testamentary jurisdiction u/s 263, Succession Act, for revocation of the grant of probate of the second will. The application was made by Rai Bahadur Pannalal and Pundit Shiva Narayan Kaul, two of the plaintiffs in this suit, notice of motion having been given on 25th August 1936. The defendants in this suit are the five executors of the second will, the testator's daughter, who is the wife of the first defendant, four persons to whom certain specific properties are thereby bequeathed in trust for charitable and religious purposes, and the Official Receiver. Paras. 7 to 25 set out a long story to the effect that the execution of the second will was obtained by the defendants other than the Official Receiver at a time when the testator lacked testamentary capacity, and that subsequently the caveators were induced to withdraw their opposition to the grant of probate by corrupt means.

4. The plaintiffs ask for a declaration that the second will is a forgery, and that the grant of probate was obtained fraudulently and by collusion. They also ask that the probate be revoked and annulled. There is a prayer for a declaration that the first will in the last will and testament of the testator. There are also prayers for accounts against all the defendants except the Official Receiver, and for administration of the estate under the direction of the Court in accordance with the provisions of the first will. Of the issues as settled by McNair J., the following have been argued, and I set them out in the order in which they were dealt with by counsel : (a) Is the Court competent to try this suit in its ordinary original civil jurisdiction? (b) Are the plaintiffs competent to file the suit? (c) Is the suit barred by res judicata? (d) Is the suit maintainable without the consent in writing of the Advocate-General of Bengal?

5. When Mr. Roy began to address me on behalf of the plaintiffs I observed that I did not see how I could possibly enforce any right under the first will until a grant of probate or letters of administration had been obtained in respect of it. No grant was asked for, nor, I thought, could one be asked for in a suit on the original side. Mr. Roy conceded that this was so, and said that the only relief he proposed to claim was revocation of the grant of probate. Issue (a) can

accordingly be paraphrased thus : "Can this Court in its ordinary original civil jurisdiction revoke a grant made by it in the exercise of its testamentary jurisdiction?" In the Letters Patent of 1865, Clauses 11 to 18 (inclusive) are grouped under the head "Civil Jurisdiction of the High Court." Clause 11 defines the local limits of the ordinary original civil jurisdiction of the High Court. Clause 12 empowers the High Court in the exercise of its ordinary original civil jurisdiction to receive, try, and determine suits of every description subject to certain conditions. Clause 13 empowers the High Court to remove and to try and determine as a Court of extraordinary original jurisdiction suits from other Courts. Clause 14 deals with joinder of causes of action, and Clause 15 with appeals from the judgment of one Judge. Clause 16 confers appellate jurisdiction on the High Court. Clause 17 transfers the jurisdiction of the Supreme Court with respect to the persons and estates of infants, idiots and lunatics to the High Court. Clause 18 provides that the Court for relief of insolvent debtors in Calcutta shall be held before a Judge of the High Court. Criminal jurisdiction is dealt with by Clauses 22 to 30 (inclusive), admiralty and vice-admiralty jurisdiction by Clauses 32 and 33. After Clause 33 there comes the heading "Testamentary and Intestate Jurisdiction." Clause 34 confers upon the High Court the like power and authority which might be then lawfully exercised by the High Courts established under former Letters Patent in relation to the granting of probates of last wills and testaments and letters of administration. Matrimonial jurisdiction is conferred by Clause 35.

6. When we turn to the Succession Act we find that "probate, letters of administration and the administration of assets of deceased" are the subject-matter of Part IX of the Act, and Section 217 provides that all grants of probate and letters of administration with the will annexed, and the administration of the assets of the deceased in cases of intestate succession, shall be made or carried out, as the case may be, in accordance with the provisions of Part IX. Section 263 provides that a grant of probate or letters of administration may be revoked for just cause, and just cause shall be deemed to exist, inter alia, where the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case. Mr. S.N. Banerjee contends that these provisions make the Court of Probate a Court of exclusive jurisdiction, or in other words that no civil suit will lie to revoke a grant. The earliest relevant authority is *Mayho v. Williams* (1870) 2 NWP HCR 268. In that case the District Judge had held that he had no jurisdiction to entertain an application to revoke the probate of a will, the execution of which was alleged to have been obtained by coercion. In dealing with the question of jurisdiction the High Court observed:

So far from finding anything in the Succession Act which would warrant the District Court as a Court of probate in refusing jurisdiction in such a case as the one before us, we find that by that Act jurisdiction on matters of probate is given only to the District Court and the High Court. The Judge holds that the appellant has a remedy by regular suit in the Civil Court. The ruling proceeds on a misapprehension of the nature of probate and the effect of a grant of probate by

a competent Court. The Judge seems to have considered that a grant of probate is in the nature of a summary proceeding to be contested by a regular suit in the Civil Court. This view is wholly erroneous. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of probate, and not in the exercise of its ordinary civil jurisdiction.

7. The earliest authority in this Court is *Komollochun dutt v. Nilrutten Mondal* (1879) 4 Cal. 360. There a suit for possession was filed in the Court of the Subordinate Judge, who held that the grant of probate of a will in virtue of which the defendant was holding was conclusive as to its genuineness. On remand by the District Judge, the Sub-ordinate Judge found the will to be a forgery, and the District Judge decreed the suit. On appeal to the High Court, Markby J. observed:

We think that the District Judge was wrong in holding that the grant of probate could be impugned in this suit. The grant of probate is a decree of a Court which no other Court can set aside, except for fraud or want of jurisdiction and no such ground is alleged here.

8. Reference is then made to the passage in *Mayho v. Williams* (1870) 2 NWPHCR 268 which I have set out above. Markby J. adds:

The proper course, if it is suggested that the probate has been wrongly granted, is to apply to the District Judge to revoke the probate, for which a special procedure is provided by the Act.

9. Mr. S.C. Roy maintains that this passage recognizes the right of a Civil Court to entertain the present suit, inasmuch as fraud in obtaining the probate is alleged. In my opinion the scope of this suit is not limited in this way, since the validity of the second will as a testamentary disposition is directly challenged, and the first prayer is for declaration that it was never executed or signed by the deceased, and is a false and fabricated document. In the goods of Mohendra Narain Roy 5 CWN 377 has been referred to. In that case Sale J. held that where it was sought to revoke a probate on the ground that the will was a forgery, the proper mode of procedure was by application under the Section of the Probate and Administration Act 1881, corresponding to Section 263 of the present Succession Act, and not by suit. The plaintiffs have drawn my attention to In the goods of Harendra Krishna Mukherjee 5 CWN 383 where Harington J. stated that he did not agree with the contention that *Komollochun dutt v. Nilrutten Mondal* (1879) 4 Cal. 360 was an authority for the proposition that a grant of probate cannot be revoked by a regular suit instituted for that purpose. He adds however:

No doubt that case lays down that the grant of probate cannot be questioned as an ordinary civil suit, but it does not lay down that probate cannot be revoked by a regular suit brought in this Court by which the probate was granted under its probate jurisdiction.

10. In taking this view Harington J. was influenced by Form No. 115 (2) in

Schedule IV, Part E, C.P. Code of 1882. This Form is omitted from the present Code. In any case, Harington J.'s observation cannot justify a suit to revoke a grant instituted in the ordinary original civil jurisdiction. Reference has been made to the observations of the Judicial Committee in *Kurrutulain Bahadur v. Nazbatuddowla Abbaas Hussain Khan* (1906) 33 Cal. 116 and *Ramanandi Kuer v. Mt. Kalawati Kuer* A.I.R.(1928) P.C. 2 to the effect that questions of probate law and procedure in India must be determined upon an examination of the relevant Indian enactment, uninfluenced by any consideration of the previous state of the law or the English law upon which the enactment is founded. In the matter of *Bhobosoonduri Dabee* (1881) 6 Cal 460 has been cited. There the District Judge exercising probate jurisdiction held that neither an attaching creditor of the next of kin of a deceased person, nor a mortgagee claiming on the basis of a mortgagee of the deceased's property created by the next of kin after the death of the deceased, was entitled to file a caveat against the grant of probate of an alleged will of the deceased. The High Court on appeal held that the creditors could not challenge the will as a forgery except in a Court of Probate. White J. stated:

The only ground on which the appellants could impeach the probate in a Civil Court would be those stated in Section ii, Evidence Act, namely that the probate was granted by the Court not competent to grant it, or that it was obtained by fraud or collusion, which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will *Barnesly v. Powel* 1 Ves Sen 119 but they could not show that the will was never executed by the testator, or was procured by a fraud practised upon him.

11. If we regard the question from the point of view of principle, and apart from the authorities, we arrive at the same conclusion. The judgment of a Court of Probate is a judgment in rem and binds all the world. The judgment in a civil suit is operative only between the parties to it. It is hard to see how a judgment in rem can be revoked or set aside by a judgment which is only conclusive inter partes. If we apply this test to the circumstances of the present case it is to be observed that there are legatees, who have acquired rights under the second will, who are not parties to the civil suit. A decision in favour of the plaintiffs would clearly not be binding on them. In revocation proceedings u/s 263 these legatees would be entitled to intervene as of right. In a civil suit their right to participate in the proceedings is not absolute, but depends on the discretion of the Court exercisable under Order 1, Rule 10(2), Civil P.C.

12. In the course of argument some confusion has been caused by the fact that the jurisdictions of the Court are subject to cross divisions. Their division according to subject-matter, i.e. matrimonial, criminal, testamentary, etc. is a division which has nothing to do with the division into ordinary and extraordinary or into original and appellate. It is for this reason that *Navivahas v. Turner* (1889) 13 Bom. 520 which decided that the High Court in entering up judgment against an insolvent in pursuance of an order of the Insolvency Court was

exercising ordinary and not extraordinary jurisdiction, within the meaning of Article 180, Limitation Act of 1877, is of no assistance to the plaintiffs. The same consideration is applicable to the argument based on fact that contentious probate proceedings before a District Judge are a "suit being or falling within the jurisdiction of any Court" within the meaning of Clause 13, and may be removed to the High Court as a Court of extraordinary original jurisdiction *Pran Kumar Pal Chaudhury Vs. Darpahari Pal Chaudhury*, .

13. In my opinion neither Clause 12, Letters Patent, nor Section 9, Civil P.C., gives the original side of this Court jurisdiction to entertain a suit for revocation of a grant of probate made in the testamentary jurisdiction on the ground that the will is not a genuine will. I would indeed go further and be inclined to hold, if it were necessary that no civil suit lies to revoke a probate on any ground, for, it is my view that it was the intention of the Legislature that the exclusive remedy in every case should be an application u/s 263, Succession Act. As an illustration of this principle I would refer to the judgment of Jenkins C.J. in *Bhaishankar Nanabhai v. Municipal Corporation of Bombay* (1907) 31 Bom 604. Moreover, the language of Section 264(1), Succession Act

the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district

indicates to my mind that the jurisdiction to revoke is limited to the Probate Court. I hold therefore that the issue of jurisdiction must be determined in favour of the defendants. In these circumstances the remaining points argued can be briefly dealt with. As to the point taken with regard to *res judicata*, it would certainly seem at first sight that *McNair J.*'s decision, that the appellants before him, who are plaintiffs 1 and 2 before me, had not such an interest in the subject-matter of the residual bequest in the earlier will to justify their bringing the application for revocation, binds them at least. I will assume it to be so, and I will also assume that it would be possible to dismiss them from the suit and permit it to continue at the instance of the other plaintiffs. The question then arises whether *McNair J.*'s decision binds the plaintiffs that remain. I do not think it does, although it has not been contended that the remaining plaintiffs have any better qualifications to institute a representative suit than the applicants before *McNair J.*

14. The reason for my opinion is this and I recognize that it is based on an argument not taken either before me or before *McNair J.* The proceedings before him appear to me to be so hopelessly irregular that I doubt if they can bind anyone, and I am convinced that at most they can only bind the actual parties. I have looked into the petition for revocation and it is not stated therein either that the permission of the Court to sue was obtained under Order 1, Rule 8(1) or that directions were given by the Court for personal service or service by public advertisement, as is required by the same sub-rule. In AIR 1933 183 (Privy Council) , the Privy Council held that in a representative suit the decision in a former suit does not operate as *res judicata* by force of Section 11, Civil P.C.,

Expl. 6, unless the former suit was instituted in compliance with Order 1, Rule 8, namely by permission of the Court, the Court giving notice as therein prescribed.

15. The possibility of an exception was recognized in a case where the former suit having been litigated bona fide on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury there-from has been sustained by the plaintiff in the second suit. Lord Blanesburgh, delivering the judgment of the Board, was at pains to emphasize that in such a case a heavy burden lay on the defendant in the second suit to prove that the conditions specified above had been satisfied. Unless this is satisfactorily proved, the defendant is not entitled to the benefit of Section 11. In this case, so far from adducing proof of the bona fides of the former proceedings, the defendants have insisted that throughout the plaintiffs have been actuated by personal and indirect motives.

16. On the question of the eligibility of the plaintiffs to bring the suit in a representative capacity, I should, if it were necessary, feel bound to take a view opposed to that of McNair J. It is true it cannot be and has not been contended that any of the plaintiffs is a boy or a girl belonging to the Hindu community within the meaning of the residuary bequest. Nonetheless, the bequest appears to me to be one in which adult members of that community can fairly be said to have an interest within the meaning of Order 1, Rule 8(1). In *Khursaidi Begum Vs. Secretary of State for India*, , which apparently was not cited to McNair J. certain property on the failure of the natural heirs of a Shia was said to vest in the imam to be distributed equitably and properly among the poor and indigent of the Shia community. The suit was instituted by the plaintiffs, who, though Shias, were not poor Shias, and was expressed to be on behalf of the Shia community. On the question of the right of the plaintiffs to sue, Ross J. observed, page 559:

It seems to me that so far as the present suit is concerned it is a suit for a declaration of trust and in this matter the interest of all Shias are identical. It may be that if there is a trust it is the poor Shias who are the beneficiaries but the entire Shia community is entitled to have the trust declared even if it be a trust in favour of the Shia poor.

17. McNair J.'s decision was based to a large extent on *Ramchandra Aiyar v. Parameswaran* A.I.R.(1919) Mad. 384. There it was held that one of the plaintiffs who was a native of Cochin and a resident of Madras, had not, merely on the ground that he was a Hindu, an interest within the meaning of Section 92, Civil P.C., in the trust of a Hindu temple situated at Tellicherry in North Malabar. Now in the present case the element of locality is absent. The testator was a resident of Delhi, but there is nothing in the first will to suggest that he wished the benefits of his residuary bequest to be limited to the Hindu boys and girls of that city. If the present plaintiffs are not qualified to institute a representative suit, it is hard to say who is so qualified.

18. Finally it is said that the suit is incompetent because the consent in writing of the Advocate-General has not been obtained u/s 92. In my judgment the suit maintainable does not fall within the scope of Section 92. No breach of trust is alleged, nor are directions asked for the administration of any trust. Indeed no trust can really be said to exist as long as the probate of the second will remains unrevoked. Even after revocation of the second will there will be no trust until probate or letters of administration have been obtained in respect of the first will. I am conscious that I have dealt somewhat superficially with the issues other than the issue of jurisdiction. My decision on that issue however is fatal to the plaintiffs and the suit will accordingly be dismissed with costs.