

(1921) 08 CAL CK 0002
In the Calcutta High Court

Rani Hemangini Debi and Others

APPELLANT

Vs

Sarat Rundari Debya and Others

RESPONDENT

Date of Decision : 11-08-1921

Acts Referred:

Probate and Administration Act, 1881 — Section 50

Citation : AIR 1921 Cal 292 : 66 Ind. Cas. 882

Hon'ble Judges : Panton, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for attribution, which has been instituted by them as executors to the estate of the late Raja Jogendranath Ray of Natore. The case for the plaintiffs is that on the 19th September 1916, they satisfied a mortgage decree which was operative against the estate of their testator as also the properties of the defendants. They consequently pray for recovery of specified sums by way of contribution from different sets of defendants. The defendants repudiate the validity of the claim and also contend that the plaintiffs are incompetent to maintain the action. The Subordinate Judge has dismissed the suit on the preliminary point on two grounds, namely, first, that before the institution of the suit, the executorship of the plaintiffs must be deemed to have terminated when the heir at law of the deceased testator attained majority; and, secondly, that even if the executorship has not terminated, the plaintiffs, who are three out of four surviving executors, are not competent to maintain the action, as the Will contemplated that at least six executors should take joint action. On the present appeal, the plaintiffs have controverted the view adopted by the Subordinate Judge on the question of the competency of the suit. We shall examine the two points raised by the appellants in the order stated above.

2. As regards the point, it is not disputed that Raja Jogendranath Ray made a testamentary disposition of his properties on the 11th May 1900, that after his death the Will was duly proved on the 2nd April 1902, and that on the 23rd June

1902, the District Judge granted Probate to seven persons (named as executors therein) in the form prescribed by Section 75 of the Probate and Administration Act. This grant is not in express term? limited in duration and, attracts the operation of Section 82, which provides that after the grant of Probate, do other than the person to whom the same shall have been granted, shall have power to sue or prosecute any suit or otherwise act as representative of the deceased throughout the province in which the same may have been granted, until sash Probate shall have been re-sailed or revoked, The plaintiffs contend that inasmuch as the Probate has admittedly been neither recalled nor revoked, no question can arise as to their competence to institute the present suit. The defendants urge that as u/s 3 of the Probate and Administration Act the term "Probate" means the copy of a Will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator, the scope of the grant should be interpreted in the light of the provisions of the Will, and, further, that if this rule of construction be applied, it will be found that the grant has ceased to be operative, because the clear intention of the testator, to be gathered from his Will, was that the executors should case to hold office on the attainment of majority by the heir at-law. This argument plainly raises two distinct questions, namely, first, is it open to a Court, other than the Court which granted the Probate, to investigate whether a grant expressed in general terms and not explicitly limited in duration, has expired by reason of the provisions of the Will and, secondly, if such collateral attack is permissible in a Court other than the Court of Probate, had the grant in the present use ceased to be operative before the commencement of this litigation? As regards the first of these points, the plaintiffs have maintained that where a grant is not expressly limited in duration but is formulated in general terms, the Court of Probate and that Court alone is competent to determine whether it has ceased to be operative, is other words, whether occasion has arisen to re call or revoke the grout. In support of this proposition, reference has been made to Sections 50 and 82 of the Probate and Administration Act. Section 50 provides that a grant of Probate may be revoked or annulled for just cause which is defined to include amongst others the contingency that the grant has besoms useless and, inoperative through cirsumstances. The argument in substance is that a general grant made in terms of Section 76 is operative u/s 82 until the Probats shall have been re-called or revoked for the reason, amongst others, specified in Section 50 that the grant has become useless and inoperative through cirsumstances. In our opinion, this contention is well-founded. This view receives support from the principles which underlie the decisions in Surendra Nath v. Amrita Lal Pal 51 Ind. Cas. 986 : 23 C. W. N. 763 : 29 C. L. J. 496 : 47 C. 115. and Chandra Kumar v. Prasonna Kumar 64 Ind. Cas. 997 : 33 C.I.J. 451 : 25 C. W. N. 977: 48 C. 1051. In the former case, it was ruled that the phraseology of the fourth Clause of Section 50 is sufficiently general to make it applicable to cases where the circumstances contemplated have happened since the date of the grant, In the latter case, it was ruled, on the authority of the decision of the Judicial Committee in Bombay Burmah Trading Corporation v. Frederick Yorke Smith 19

B. 1 : 21 I. A. 139 : 6 S. P. C. J. 498 : 10 Ind. Dec. (N. S.) 1 ., that so long as the person entitled to the estate has not taken it out of the possession of the executors, they are entitled to continue in occupation of the estate, The principle need not be affirmed in an unqualified form that "once an executor always an executor"; it is sufficient to hold that a general grant must be deemed to continue in force until the Probate or Letters of Administration shall have been resealed or revoked by the Court of Probate on one or other of the grounds enumerated in Section 50. We are not now called upon to consider whether an order for revocation is necessary, when a grant has been, in express terms, limited in duration, and the time specified has elapsed. But we observe that even upon that question, there has been divergence of judicial opinion in other systems of law. Thus in *Offley v. Best* (1643) 1 Sid. 370 : 82 E. R. 1163., *Freke v. Thomas* (1792) 1 Salk. 39 : 11 d. Ray. 667 : 91 E. R. 40., *Slater v. May* (1705) 1 Sal. 42 : 2 Ld. Ray. 1071 : 91 E. R. 42, *Matcalfe, In re* (1822) 1 Add. 343 : 162 E. R. 121. and *Howell v. Metcalfe* (1824) 2 Add. 348 : 162 E.R. 821., it appears to have been assumed that no revocation was necessary, where the grant, on the face thereof, was limited in duration and the prescribed period had elapsed. Reference may also be made to the judgment of Sir John Nicholl in the case of *Cassidy, In re* (1882) 4 Hag. 360 : 162 E. R. 1477. where, as Judge of the Prerogative Court, he did not revoke a grant of administration with Will annexed to an attorney of the executor who was abroad, but pronounced it to have ceased and expired on application of the executor for Probate and on affidavit that no suits were pending. It was further directed that future grants *durante absentia* should be expressly limited until the executor or party entitled to administration should duly apply for and obtain a grant: see also *Webb v. Rirby* (1865) 7 De G. M. & G. 376 : 26 L. J. Ch. 145 : 3 Jur. (N. S.) 73 : 5 W. R. 189 : 44 E. R. 147 : 109 R. R. 175., *Bendell, In re. Wood v. Rendell* (1801) 1 Ch. 230 : 70 L. J. Ch. 265 : 83 L. T. 625 : 49 W. R. 131., *Hewson v. Shelley* (1914) 2 Ch. 13 : 83 L. J. Ch. 607 : 110 L. T. 785 : 58 S. J. 397 : 30 T. L. R. 402., *Rainbow v. Kittoe* (1916) 1 Ch. 313 : 85 L. J. Ch. 468 : 114 L. T. 606 : 60 S. J. 338., *Suwerkrop v. Bay* (1838) 8 A. & E. 624: 3 N. & P. 670 : 1 W. W. & H. 463 : 7 L. J. Q. B. 261 : 112 E. R. 975 : 47 R. R. 676., On the other hand, in *Piton v. Wallis* (1753) 1 Lee 102 : 161 E. R. 148., *Phillips, In the goods of* (1824) 2 Add. 335: 162 E. R. 316. and *Newton, In the goods of* (1843) 3 Curt. 428 : 7 Jur. 219 : 163 E. R. 780. the view was favoured that even in such cases, a formal order of revocation is necessary. Substantially to the same effect is the decision of Lord Eldon and Sir William Grant, M. R., in *Rainford v. Taynton* (1802) 7 Ves. 460 : 32 E. R. 186. A similar view has been adopted in the United States as appears from the decision in *Morgan v. Dodge* (1862) 44 N. H. 255 : 82 Am. Dec. 218. But whatever room for difference of opinion there may be elsewhere in cases of grants expressly limited in duration or made for a specific purpose, it is fairly dear that under our statutory provisions a grant made in general terms must be deemed to continue in operation till revoked or resealed in an appropriate proceeding instituted before a Court competent to exercise jurisdiction in that behalf. This conclusion is in harmony with the elementary rule

that where a judgment operates as a judgment in rem (as the decision of a Probate Court does u/s 41 of the Indian Evidence Act) it is not subject to collateral attack; while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons and all Courts. This view renders unnecessary an examination of the second point, namely, assuming, that the grant and he collaterally attacked in the present suit, did it in law expire on the attainment of majority by the heir-at-law? It is manifest!, however, that the construction of the Will as propounded by the defendants cannot be supported. The third Clause of the Will does not lay down that the executorship would terminate on the attainment of majority by the grandson of the testator. It is dear, even on the terms of that clause taken by itself, that the executorship might continue after the heir-at law should have attained majority. But the other clauses of the Will leave no room for doubt on this point; reference may be made specially to the provisions of clauses 9 and 10 which deal with the expenses of maintenance and education of the grandson, or in the event of his death, of the adopted son, and also the expenses of maintenance and marriage of the granddaughters and their sons and grandson?. We are of opinion that the testator did not intend that the executors should cease to hold office immediately on the attainment of majority by his grandson. From, both these standpoints, we must hold accordingly that the authority of the executors had not lapsed before the commencement of this litigation.

3. As regards the second question, the Subordinate Judge has held that in view of the direction in the Will that there should be at least six executors action at the same time, three executors cannot maintain this suit. We have examined the provisions of the Will and we are unable to uphold the view taken by the Subordinate Judge. We are fortified in our opinion as we find that this very Will was so interpreted by Holmwood and Imam, JJ., in another case which came up to this Court, when they ruled that three executors out of the four who had obtained Probate were competent to carry on proceedings in execution of a rent decree. In our judgment, the Will affords no clear indication that the testator intended to supersede the rule enunciated in Section 92 of the Probate and Administration Act, namely, that when there are several executors, the powers of all may, in the absence of any direction to the contrary in the Will, be exercised by any of them who has proved the Will; *Satya Prashad Pal v. Motilal Pal* 27 C. 683 : 14 Ind. Dec. (N. S.) 413. In the case before us, Probate was granted to seven executors; three of them have died and their places have not been filled up; three others have instituted this suit, and the remaining executor who refused to join as a plaintiff has been included in the category of defendants. We are not prepared to say that the provisions of the Will invalidate a suit so framed.

4. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for re-trial on the merits. The plaintiffs are entitled to their costs in this Court. The costs in the Court below will be in the discretion of the Subordinate Judge. As the suit has been dismissed on a preliminary ground, we direct, u/s 13 of the Court Fees Act, that the Court-fees

paid en the memorandum of appeal be refunded to the appellants.