
(1940) 08 PAT CK 0025
In the Patna High Court

R.S. Sinha

APPELLANT

Vs

Miss Salena Hector

RESPONDENT

Date of Decision : 09-08-1940

Acts Referred:

Succession Act, 1925 — Section 242, 288(1)(c)

Citation : AIR 1941 Patna 151

Hon'ble Judges : Harries, C.J.;Fazl Ali, J

Bench : Full Bench

Judgement

Harries, C.J.—This is an application by Mr. R.S. Sinha, an advocate of this Court, to prove the will of one Mrs. Elsie Augusta Black in common form.

2. On 12th December 1937, it is alleged that the testatrix executed the will in question and on 29th December 1937, she died. The will names Mr. Sinha and Miss Salena Hector as executor and executrix, but Miss Salena Hector, so far from joining in this application for probate in common form has objected to it. She has also entered a caveat in the proceedings. The executor, Mr. Sinha, has raised a preliminary point that Miss Salena Hector has no right to oppose these proceedings on the ground that she is not interested in the estate. As I have stated, she is named as an executrix in the will; but as executrix she could only put forward the will and not oppose it. Miss Salena Hector, it is said, is also a creditor of the estate, and Mr. Kazimi who has appeared for her has conceded that he cannot object to probate on the ground that Miss Hector is a named executrix, but he has contended that he can object to probate in common form on behalf of Miss Hector as a creditor of the estate.

3. It appears that the testatrix was a legatee under her sister's will, and at one time it appears to have been thought that the testatrix would have obtained a very substantial sum under that will. On the death of the testatrix's sister, proceedings connected with her will took place in the Calcutta High Court. The result of those proceedings was that the testatrix was entitled only to Rupees 2051-2-5 instead of what was thought to be a legacy of a lakh of rupees. When

the testatrix made her will, it is suggested that she was under the impression that she would have a considerable amount of money to dispose of; but owing to the manner in which the litigation in Calcutta ended it now transpires that her estate is insolvent and that the money in hand is not sufficient to pay the debts, some of which are mentioned in the will.

4. The executor, Mr. R.S. Sinha, is said to be a creditor of the estate to the extent of Rs. 4000 whereas Miss Salena Hector is a creditor to the extent of Rs. 750 together with interest making a total of about Rs. 1100. It is clear that the estate cannot pay all the debts, and it is suggested by Miss Hector in these proceedings that the debt of Rs. 4000 said to be due to Mr. Sinha is not a genuine debt. Consequently Miss Hector contends that if probate of this will be granted, her chances of obtaining the money due to her will be gravely prejudiced. On her behalf it has been urged that if probate is granted to Mr. Sinha, he will, as executor, readily acknowledge that money was due to him from the estate as a creditor and claim to share rateably with the other creditors. Thus what Miss Hector will obtain will be very much less than she would otherwise obtain.

5. Mr. K.K. Banarji on behalf of Mr. Sinha, the executor, has contended that Miss Hector has no right whatsoever to oppose these proceedings. It is conceded that she has no right as a named executrix; but, it has been strongly urged by Mr. Kazimi that as a creditor of the estate she is entitled to oppose the grant of probate. It is clear from the terms of Section 288(1)(c), Succession Act, 1925 that all persons claiming to have any interest in the estate of the deceased must receive citations and a person having an interest in the estate of the deceased can oppose the grant of probate of a will. Whether or not a person can oppose the grant of probate depends entirely upon whether he has or has not an interest in the estate of the deceased. Such is the law in England, and it is clear from the English authorities that a mere creditor of the estate cannot oppose the grant of probate.

6. This was laid down in *Menzies v. Pulbrook and Ker* (1834) 2 Curt. 846. In that case Sir Herbert Jenner considered at length all the relevant authorities and the practice of the Court of probate and came to the conclusion that a creditor had no right in England to oppose the grant of probate because he had no interest in the estate of the deceased person. A creditor is entitled to be paid his debt from the estate whether the deceased has left a will or not. If there, is a will, the executor must pay the debt before he proceeds to distribute the estate amongst the beneficiaries.

7. In the same way, in the case of an intestacy, the administrator must pay the debt before distributing the estate amongst the next of kin. The case in *Menzies v. Pulbrook and Ker* (1834) 2 Curt. 846 is still regarded as good law in England and has never been questioned in any English case or by any text-book writers.

8. This case, of course, cannot be decided on English authorities because the Court has to construe the Indian Succession Act. However, when there are clear

English authorities dealing with the question whether a creditor has or has not an interest in the estate, such authorities are helpful when precisely the same question has to be answered in India. As I have stated, what determines the question as to whether a person can or cannot object to a probate is whether he has or he has not an interest in the estate. The same point really has to be decided both in England and in India.

9. The English case in *Menzies v. Pulbrook and Ker* (1834) 2 Curt. 846 has been followed in this country in *Rahamatullah Sahib v. Rama Rao* (94) 17 Mad. 373. In that case it was laid down that in a suit brought to-obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate. The fact of being a legatee under the will, or a creditor of the testator does not amount to such an interest. But proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up. In that case *Menzies v. Pulbrook and Ker* (1834) 2 Curt. 846 is cited with approval.

10. In India attempts have also been made to show that the creditor of an heir of the testator is interested in the testator's estate. The creditors of the heir or next of kin of a testator may well be vitally interested in upsetting a will put forward by an executor. Such a will might deprive the heirs or next of kin of the testator of the whole of the property which would come to them on an intestacy, and in such case the creditors of such heirs or next of kin would suffer very materially. The question was considered in *In the matter of The Petition of Desputty Singh* (77) 2 Cal. 208 but a Bench of the Calcutta High Court held that the creditors of the heirs or next of kin of a deceased person were not persons interested in the estate of the deceased. This case was expressly approved of by their Lordships of the Privy Council in *Nilmoni Singh Deo v. Umanath Mookerjee* (84) 10 Cal. 19.

11. A somewhat different view was taken by another Bench of the Calcutta High Court in *Kishen Dei v. Satyendra Nath Dutt* (01) 28 Cal. 441 where it was held that a creditor of a testator's heir could object to probate if the will had been set up for the purpose of defrauding creditors. It is very difficult to reconcile these two Calcutta cases because it seems tolerably clear that in *In The Matter of The Petition of Desputty Singh* (77) 2 Cal. 208 the will must have been put forward with a view to depriving the heir of his right to succeed to the testator's property.

12. In the later case in *Kishen Dei v. Satyendra Nath Dutt* (01) 28 Cal. 441 the learned Judges appear to have based their decision upon an observation of their Lordships of the Privy Council in *Nilmoni Singh Deo v. Umanath Mookerjee* (84) 10 Cal. 19 which I have already cited. In that case their Lordships were considering a judgment dealing with the question whether a purchaser from a person interested on intestacy or an attaching creditor could object to probate. Their Lordships made this observation:

Assuming that a purchaser can oppose the grant of a probate, or apply to have it

revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditor.

13. A Bench of the Calcutta High Court in *Kishen Dei v. Satyendra Nath Dutt* (01) 28 Cal. 441, appear to have taken this as an authority for the proposition that the creditor of the heirs of a testator can oppose the grant of probate if they allege that the will was executed in fraud of creditors. In my view, the observation of their Lordships does not support the view taken in this later Calcutta case. Their Lordships expressed the gravest doubt as to whether an attaching creditor could oppose the grant of probate or apply to have it revoked and all they said was that if it was shown that probate had been obtained in fraud of creditors-the attaching creditor might possibly succeed in having the probate set aside though they do not decide the question.

14. It is to be observed that no exception is made in English law in the case of the will having been executed or put forward in fraud of creditors. In the ordinary case, it does not much matter to a creditor whether a forged will is propounded or not because he must be paid his debt before the property can be divided amongst the beneficiaries named in the will. The creditor is in a happy position of coming ahead of all beneficiaries whether the will is a genuine one or whether it be an invalid one. It matters-not to him whether he is paid by an executor or an administrator because his rights take precedence over the rights of beneficiaries under the will or the heirs or next of kin on an intestacy. Mr. Kazimi has however suggested that in this case the fact that certain debts are mentioned in the will will prejudicially affect him if the will is proved. It must be remembered, however, that the fact that debts are mentioned in the will does not amount to proof of such debts. Granting probate of the will, will not establish either the existence or the validity of such debts.

15. According to Mr. Kazimi, if this will is proved it will become impossible to challenge these debts, because the mention of them in the will would amount to acknowledgements and would prevent limitation running. As I have said, the mere mention of debts in a will in no way proves their existence and granting of probate would not make very much difference. It would still be open to the executor to show that no such debts existed, and if he discharged the debts which did not exist, he could in appropriate proceedings be made to account.

16. Mr. Kazimi has also relied upon the case in *Jammi Hanumantha Rao Vs. Aratla Latchamma*, . All that case decided was that a person who is entitled to any portion of the estate left by a deceased or to a right to claim maintenance from such estate, had an interest in the estate of the deceased and could object to probate. However, the learned Judges who decided the case did make this observation:

In *Rahamatullah Sahib v. Rama Rao* (94) 17 Mad. 373, it was held that a legatee under a will or a creditor of the testator had not such interest as to entitle him to

oppose the grant of probate. In the case of a creditor the estate is liable, whether the will is genuine or not. The executor, and if there is no executor the administrator, is bound to pay the debt of the testator out of the estate and the creditor will not ordinarily suffer in any way by a false will being propounded and probate thereof being obtained. There may be cases where it may be to the interest of the creditor to oppose the grant of probate if by obtaining probate an unscrupulous person or a person of no means is enabled to make away with the property of the deceased and thereby defeat the creditor. If the probate proceedings are fraudulent, any person who would suffer thereby is entitled to object to such proceedings.

17. The learned Judges cited no authority for this statement and no such exception appears to have ever been made in England. It is always open to creditors to show that debts alleged to be due from the estate are not due, but that is very different from saying that a creditor can object to probate of the will being granted, that is, can object to the validity of the will as a will.

18. A view similar to that expressed in *Jammi Hanumantha Rao Vs. Aratla Latchamma*, , was expressed by the Lower Burma Chief Court in *Ma E Me v. Ma E* AIR 1914 L.B. 43. There again the observation is a general one and was not strictly necessary for the decision of the case. It is very doubtful whether a creditor by merely alleging that a, will is a forgery or that the named executor is acting fraudulently becomes a person who has an interest in the estate of the deceased. He may be a person who might suffer as a result of the forgery or fraud; but a person who may suffer does not necessarily mean a person who actually has an interest in the testator's estate. A creditor who has attached a portion of the estate might possibly be a person who had an interest in the estate but a mere creditor without even a decree can hardly be said to have an interest in the estate. Mr. Kazimi admits that unless the creditor alleges that he would suffer by probate he cannot be said to have an interest in an estate; but I cannot conceive that any creditor would ever come forward to oppose probate unless he feared that he would suffer if probate was granted. The creditors in the English cases must have made some such allegation, yet the English Courts have consistently held that such creditors have no interest in the estate. I do not wish in this case to lay down any general principles; but in my view Miss Salena Hector, by merely alleging that some of the debts mentioned in this will are not genuine, does not thereby become a person interested in the estate of the deceased. If this will is proved, she would not by that fact alone be materially affected; but even if she was that would not in itself establish that she had an interest in the estate. It is sufficient in this case to confine our decision to the facts of the case, and in my view the allegations made in this case do not make Miss Salena Hector a person having an interest in the estate, and that being so, she has no right to object to the granting of probate in common form.

19. That, however, does not dispose of this case. The facts are somewhat peculiar, and in our view it is in the interests of all parties that a Court should

decide after investigation whether this will is valid or not. The testatrix was an old lady who was undoubtedly very ill at about the time she made her will. She named two of her creditors as executor and executrix, and one, the largest creditor, is an advocate claiming to be a creditor in respect of moneys advanced.

20. In these circumstances, I am of opinion that probate should not be granted of this will until the Court after investigation is satisfied that the testator was of a sound disposing mind and that the will was duly executed according to law. In holding this view, I express no opinion whatsoever upon the allegations made by Miss Salena Hector, I merely consider proof of this will to be necessary having regard to all the facts and circumstances of the case.

21. I would, therefore, refuse to grant probate of this will in common form and direct that the matter be heard by the Judge exercising probate jurisdiction in this Court, who will, after hearing the evidence, grant or refuse probate. The caveat will be discharged.

Fazl Ali J.

22. I entirely agree. In In the matter of the petition of Bhobosoonduri Dabee (81) 6 Cal. 460 Field J., in dealing with the question as to what class of persons are entitled to object to the grant of probate of the will of a testator observed as follows:

As to the test of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to this, that any person has a sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of Section 242, Succession Act.

23. In my opinion the test laid down by Field J. is correct, and, therefore, a simple creditor, who is entitled to maintain merely a suit to recover his money and cannot maintain a suit in respect of the property of the testator cannot ordinarily object to the grant of probate. The interest, which entitles a person to object to the grant of probate, must be an interest in the estate and not merely an interest in the result of the probate proceedings or "interest" in any remote sense of the term.