

(1943) 02 PAT CK 0002

In the Patna High Court

Smt. Bahuria Manikraj Kuar

APPELLANT

Vs

Smt. Amarbas Kuar and Others

RESPONDENT

Date of Decision : 08-02-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4
Succession Act, 1925 — Section 263

Citation : AIR 1944 Patna 38

Hon'ble Judges : Manohar Lall, J;Brough, J

Bench : Full Bench

Judgement

Brough, J.—This is an appeal from an order of the learned District Judge at Gaya dismissing an application made u/s 263, Succession Act, for the revocation of the probate of the will of one Rai Bahadur Naurangdeo Narain Singh. The application was by Smt. Bahuria Manikraj Kuar, the surviving widow of the alleged testator, and the facts as set out in her petition of revocation were that Naurangdeo Narain Singh, who was the owner of extensive properties, died on 25th August 1910, leaving two widows, the petitioner and another lady who has since died, and two daughters by a third wife and their descendants; that the petitioner was an illiterate and pardanashin lady entirely in the hands of her stepdaughters' husbands, that on 4th October 1938, she was informed that opposite parties 41 to 45 had taken out delivery of possession over certain properties out of her husband's estate in some execution case which caused her to make enquiries from which she ascertained that the husbands of her two step-daughters had caused a will dated July 1910 purporting to be will of the said Rai Bahadur to be forged, naming one Ramanand Patnaik as the sole executor, and that the said will was proved by him in Probate Case No. 15 of 1911. The said will purported to leave the testator's property to the two daughters with small annuities to his widow. She further alleged that the citations which purported to have been issued upon her in Probate case No. 15 of 1911 were not in fact served on her and that she was a minor at that time and she prayed for the revocation of grant of the probate. She made respondents to the application the testator's two

daughters and their issue and a large number of other persons, some 69 in all, who were impleaded as the persons who had, by some means or other, come into possession, of different parts of the testator's estate.

2. When the matter came before the learned Judge, he heard the parties and looked at the record in the probate case of 1911 and certain documents put forward by the opposite parties, but he did not hear any oral evidence. He seems to have thought that the applicant's story was so improbable that she could not possibly have succeeded in establishing it. But he did not give her any opportunity to do so and dismissed the application without hearing any evidence.

3. In these circumstances the applicant has appealed to this Court and, but for the consideration to which I will refer in due course, I would have allowed the appeal. It is a fundamental principle that the plaintiff's case cannot be dismissed without hearing such relevant evidence as the plaintiff desires to adduce, except on the footing that the allegations of fact in the plaintiff's plaint are assumed or admitted to be true. If those allegations were assumed to be true the plaintiff would be clearly entitled to the relief she claimed.

4. The appeal was opposed before us by Mr. De on behalf of opposite party 40, who was a purchaser from the testator's grandson who had been appointed executors after the death of Ramanand Patnaik, and by Dr. Mitter on behalf of respondents 41 to 45 who were purchasers in an execution sale for a debt due from the testator himself. Reference has been made to certain cases, in *Mohan v. Broughton* (1900) L.R. 1900 P. 56 and *Srimati Manorama Chowdhurani Vs. Soshi Mohan Das Majumdar and Others*, to show the circumstances in which suits of this kind can be dismissed; but on examination it appears that those cases and others to which we were referred to were all cases in which the suit was dismissed after hearing evidence. The error which the learned Judge committed in this case was in not hearing evidence. Mr. De then sought to argue that the issue of the maintainability of the suit should be tried first; but I do not see how that can be done. There is really only one substantive issue in this case, whether the will was forged and whether the applicant did not come to know of the forgery until October 1938. If the applicant could have established these two points, she would have been entitled to have the probate revoked and, therefore, but for the point already referred to, I would have directed the suit to be remitted to the Court of the District Judge at Gaya to be heard and determined according to law. It appears, however, that since the decree of the learned District Judge the appeal has abated against respondents 15, 35 and 60 by reason of the death of these respondents and of the failure on the part of the applicant to substitute their successors in title. It also appears that owing to difficulties in effecting service the applicant has given up her appeal against respondents 68 and 69 and that respondents 36, 37 and 38 have been expunged from the number of respondents. In these circumstances it is submitted on behalf of the remaining respondents that the whole appeal has abated under the provisions of Order 22, Rule 4. The note in the 11th Edition of Mulla's CPC at

page 931 as to whether the whole appeal will abate is as follows:

The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. It is clear that a Court should not be called upon to make two inconsistent decrees about the same property and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole.

5. It has been pointed out that the question of a will is a single subject-matter. Mr. De referred to a decision of the Court of Appeal in England in *Birch v. Birch* (1902) L.R. 1902 in which Cozens Hardy L.J. said that a will must be either good or bad against all the world. It is not possible for this will to be good, as it has been found to be by the learned District Judge, against those respondents who are not now before this Court and bad against the others. We have also been referred to a Pull Bench case of this Court in *Ramphal Sahu v. Satdeo Jha* AIR 1940 Pat. 346 which affirmed the correctness of the principles enunciated in the note in Dr. Mulla's work to which I have referred, and to *Apurba Krishna Mitra v. Ram Bahadur* AIR 1936 Pat. 191 in which a Division Bench of this Court pointed out that there was a difference between the position after decree and before. Mohammad Noor J. in that case pointed out that although it might well be that a party was not a necessary party to the suit or that a suit could have been proceeded without abating as against some only of the defendants yet where there had been a decree and an appeal the abatement of the appeal against some of the respondents would be fatal. Mr. Sarjoo Prasad for the applicant relied on *Haimabati Mitra Vs. Kunja Mohan Das*, but this does not assist him on this point.

6. In my judgment, therefore, as the appeal has abated against eight of the respondents and as this is essentially a case in which the decision of the Court is indivisible as the will must, as was said by Cozens Hardy L.J. be either good or bad against all the world, this appeal must be dismissed. In the circumstances I would make no order as to costs.

Manohar Lall J.

I agree.