

(1923) 08 CAL CK 0025
In the Calcutta High Court

Syed Abdul Alim Abed

APPELLANT

Vs

Badaruddin Ahmed and Others

RESPONDENT

Date of Decision : 13-08-1923

Acts Referred:

Calcutta Improvement (Appeals) Act, 1911 — Section 3

Citation : AIR 1924 Cal 757

Judgement

1. This is an appeal u/s 3 of the Calcutta Improvement Appeals Act, 1911, from the decision of the President of the Tribunal pronounced u/s 77(1), (6) of the Calcutta Improvement Act, 1911. This section provides that for the purpose of determining the award to be made by the Tribunal under the Land Acquisition Act, 1894, questions relating to the determination of the persons, to whom compensation is payable or the apportionment of compensation may be tried and decided, in the absence of the Assessors, if the President of the Tribunal considers their presence unnecessary, and when so tried and decided, the decision of the President shall be deemed to be the decision of the Tribunal.

2. In the case before us, a portion of premises No. 13 Panditia Road was acquired by the Calcutta Improvement Trust by a declaration issued on the 16th November, 1920, under the Land Acquisition Act. A sum of Rs. 46,200-8-10 was awarded by the Collector on account of the land, structures, statutory allowance, damages and capitalised value of the Government revenue. Thereupon three sets of persons appeared on the scene as claimants, with a view to participate in the sum awarded. The first of these was Badaruddin Ahmed who claimed to be the sole owner of the property. The second set consisted of Prafullanath Tagore and Muktakeshi Debi who are mortgagees from Badaruddin Ahmed. The third claimant, called the counter claimant in these proceedings, was Abdul Alim Abed, who claimed to be the owner. The Collector negatived the claim of the person last mentioned and awarded the compensation money to the first two claimants, mortgagor and mortgagees. Thereafter on the 16th August, 1922, a reference was made, u/s 18 of the Land Acquisition Act, at the instance of the counter claimant whose alleged title had not been recognised by the Collector. The

reference was received in the Court of the Calcutta Improvement Tribunal on the 18th August, 1922, when notices were directed to issue on the parties concerned and the case was fixed for the 19th September, 1922, for appearance and for filing of written statements. The case was adjourned by the Court on ten occasions¹ for want of time and it was finally taken up on the 21st April, 1923, when it was adjourned to the 12th May for peremptory hearing. On that date, as it was laid down in the list, it was again adjourned to the 26th May. On that date, an application was made by the counter-claimant for stay of the trial of the proceedings pending the disposal by the High Court of an application for the grant of Letters of Administration with copy annexed of the Will of one Omer Ali Sarkar. The President of the Tribunal refused the application for stay and held that the question of the genuineness and validity of the alleged Will should be tried by the Tribunal. The counter-claimant thereupon prayed that some time should be given to him to enable him to produce the Will which had been lodged in the High Court. This prayer was refused and the President stated that even if the document had been produced, it would not have been received. The result was that what was called the apportionment case was dismissed with costs. The counter-claimant has appealed, to this Court and has contended that the order made by the President should be set aside, so that either the proceedings before the Tribunal may be stayed during, the pendency of the probate proceedings in this Court or the question of the genuineness and validity of the Will may be investigated before the compensation money is distributed. The records of the probate proceedings have been placed before us.

3. It appears that the property acquired; by the Calcutta Improvement Trust originally belonged to Omer Ali Sarkar who died on the 8th September, 1911. The case for the appellant is that Omer Ali Sarkar had executed a Will on the 11th, May, 1911. This is denied by the respondent. Omer Ali Sarkar left a sister Abir Jan. The first claimant Badaruddin Ahmed who is the respondent sets up title-under a deed of gift said to have been.: executed in his favour on the 22nd" June, 1913, by Abir Jan, who, it is asserted, took the property by right of inheritance from her brother, the original owner. The counter-claimant - Abdul Alim Abed - a grandson of Omer AH Sarkar by a daughter Ayesha who is the appellant sets up title as legatee under the alleged Will of Omer Ali Sarkar. On the 27th April, 1923, Abdul Alim Abed made an application to this Court in its testamentary jurisdiction for Letters of Administration with copy of the Will annexed in respect of the estate of Omer Ali Sarkar. The estate was valued in accordance with statutory provisions, and an ad valorem fee of Rs. 2,007 was paid as prescribed in the Court Fees Act. In this application, it was stated that the person named as executor in the Will, one Samiruddin, was of unsound mind, that the applicant was a legatee under the Will and that he had attained his majority on the 30th May, 1918. He claimed, under the Will, the premises No. 13, Panditia Road, and some ornaments. On the 30th April, 1923, Mr. Justice Greaves ordered citation to issue to the executor u/s 16, and a special citation to Abir Jan u/s 69. On the 14th May, 1923, Abir Jan filed caveat and the case is still

under consideration. In these circumstances, the respondents have argued that notwithstanding the pendency of the testamentary proceeding in this Court, the Tribunal may, and should determine the question of genuineness and validity of the Will. But before we deal with this matter, we must first consider whether the order of dismissal should stand.

4. We are of opinion that the order of dismissal of what is called the apportionment case should be discharged. The case had been adjourned repeatedly as the Court had no time to take it up. Till the matter was taken up for disposal, no application for stay, need or could have been made. As soon as the application was made, it was promptly rejected. In these circumstances an opportunity might well have been afforded to the counter-claimant to secure the prosecution of the original Will which had been lodged in this Court and was not in his custody. A considerable sum of money was in controversy, and the procedure should have been so moulded as to enable the parties to obtain an adjudication of the points in dispute.

5. Such a course was rendered imperative by reason of the possible far-reaching effect of the decisions upon questions of title by Land Acquisition Tribunals. It was pointed out by the Judicial Committee in *Ramachandra Rao v. Ramachandra Rao* AIR 1922 P.C. 80 that where a dispute as to the title to receive the compensation has been referred to the Court under the Land Acquisition Act, a decree therein renders the question of title *res judicata* in a suit between the parties to the dispute or those claiming under them. This negated, what had been regarded as the accepted view in a long series of decisions in the Indian High Courts, such as *Balaram v. Shamsunder* (1896) 23 Cal. 526 and *Trinayanee v. Krishnalal* (1910) 17 C.W.N. 935. A similar tendency to extend the operative effect of adjudications by Courts of Special Jurisdiction, is exhibited by the decisions in *Sheo Prasad v. Ram Nandan* AIR 1916 P.C. 78 and *Badar Bee v. Habib Mericon Noordin* (1909) A.C. 615 though the contrary view might be supported by a reference to a series of decisions in the Indian High Courts, *Lalit Mohan v. Radharaman* (1911) 13 C.L.J. 547. Caution was accordingly necessary and we are not prepared to uphold the order of dismissal made by the President.

6. The question which next requires consideration is, whether, in the events that have happened, the Tribunal should proceed to investigate the question of genuineness of the alleged Will, while the matter is under examination by this Court in its testamentary jurisdiction. We have been reminded that there is no provision of the law which renders it obligatory in the case of a Mahomedan Will to take probate, and that after due proof, such Will is admissible in evidence, notwithstanding that the grant of probate has not been obtained. The leading authority on the point is the judgment of Sir Charles Sargent, C.J., in *Shaikh Musa v. Shah Issa* (1884) 8 Bom. 241 which construed Section 187 of the Indian Succession Act; this was accepted as good law in *Sakina Bibi v. Mahomed Jshaque* (1910) 37 Cal. 839 and *Mahomed Yusuf v. Hargovan Das* AIR 1922 Bom. 392. On the other hand, it has not been denied that probate may be obtained of

a Mahomedan Will. The effect of a probate so obtained was considered by the Judicial Committee in *Mirza Kurratulain v. Nuzbat-ud-dowla* (1905) 36 Cal. 116 (P.C.) where Sir Arthur Wilson considered the effect of Sections 4, 59 and 88 of the Probate and Administration Act, 1881; see also *Krishna Kinkar v. Panchu Ram* (1889) 17 Cal. 272. The respondents have urged that, in such circumstances, the proceedings should be carried on simultaneously; in other words, there may be a race between the parties in the two Courts so as to render necessary a decision of the question involved in *Chinnasami v. Harihar Bhadrar* (1893) 16 Mad. 380 namely, whether the judgment of a Probate Court, granting or refusing probate, is a judgment in rem so that the judgment of another Court in a proceeding inter partes cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the Will propounded in that Court. We are clearly of opinion that such contingency should be avoided by all legitimate means. The right course to pursue is to stay the proceedings before the Tribunal, till the probate proceedings have been terminated in this Court.

7. It is beyond controversy that the Court has an inherent power to postpone the hearing of a suit, pending the decision of a selected action, and to make an order for the stay of cross suits on the ground of convenience; *Hukumchand v. Kamalanand* (1905) 33 Cal. 927 and *Nandkishore v. Ramgolam* (1912) 40 Cal. 955. This inherent power is not to be capriciously or arbitrarily exercised; it is to be exercised to facilitate that real and substantial justice for the administration of which alone Courts exist. If, from this standpoint, the Court is called upon to choose which proceeding should be stayed, there can be no serious controversy that the proceedings before the Tribunal should be stayed for more than one substantial reason. In the first place, it is not the primary function of the Tribunal to investigate controverted questions of title and adjudicate upon testamentary disputes. If the parties to this litigation had been Hindus governed by Section 187 of the Indian Succession Act, read with Section 2 of the Hindu Wills Act, the question could have been tried only by a Court of Probate. It is only because the parties are Mahomedans who are not affected by Section 187 of the Indian Succession Act, which is not incorporated in the Probate and Administration Act, that the argument has been solemnly advanced that the Tribunal should be called upon to discharge the functions of a Court of Probate. In the second place, there is every likelihood of a more comprehensive and searching investigation of the matters in issue by this Court in its testamentary jurisdiction than by the Tribunal. In the third place, Abar Jan, who is a party to the testamentary proceedings in this Court, is not and cannot be a party to the proceedings before the Tribunal. On the other hand, the Probate Court may, in the exercise of its discretion u/s 69 of the Probate and Administration Act, issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant is made. It was ruled in *In re Bhubo Sundari Debi* (1880) 6 Cal. 460, that persons having an interest in the immovable property of the deceased, such as a mortgagee of a person, who, if the testator had left no Will, would be entitled to create the mortgage, would

have such an interest in the property of the testator as to entitle him to enter caveat and oppose the grant of probate. To the same effect is the decision in *Sarbomongala v. Sasibhushan* (1884) 10 Cal. 413. Again in *Sarojini Das Vs. Haridas Ghosh-Defendant*, a purchaser from the heir-at-law was allowed to contest the grant of probate of a Will which, if genuine, disinherited him. A similar view of the position of the purchaser from the heir had been previously taken in *Ram Chandra v. Ramrav* (1896) Bom. P.J. 491 and *Digambar v. Narayan* (1910) 13 Bom.L.R. 38. This does not militate against the decision in *Jonas v. Jones* (1882) 7 P.D. 66, where, in an action as to the validity of a Will, Sir James Hannan, P., declined, apparently in the exercise of his discretion to order the assignee of the heir-at-law to be cited as a person having or pretending an interest in the real estate by the Will.

8. On all these grounds, we are of opinion that this appeal must be allowed, the decree of dismissal made by the President set aside, and all proceedings in his Court stayed pending the disposal of the proceedings in this Court for Letters of Administration with copy of Will annexed, to the estate of Omer Ali Sarkar. The sum covered by the award will be retained in Court until further orders. Each party will bear his own costs up to this stage.