

(1924) 01 MAD CK 0060
In the Madras High Court

Venkatarathnam and Others

APPELLANT

Vs

Satyavati and Others

RESPONDENT

Date of Decision : 18-01-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Probate and Administration Act, 1881 — Section 50

Citation : AIR 1924 Mad 578

Hon'ble Judges : Wallace, J;Odgers, J

Bench : Full Bench

Judgement

Odgers, J.—This is an appeal against the order of the District Judge of Godavari whereby he dismissed the appellant's petition to revoke a probata u/s 50, Probate and Administration Act. The previous history of the case is set out in the learned District Judge's order. The only facts we need consider are the following: an application was made by the widow of one Appa Rao, deceased in 1908, for Letters of Administration to his estate with the will annexed. The will is printed at page 17 of the documents in A.A.O. No. 275 of 1920, and it is to be noted that the only property of the testator on which it could take effect was a sum of insurance money, Rs. 1,000. The father of the testator entered a caveat to the proceedings of 1908 but withdrew it apparently in consequence of an agreement (printed at page 5 of the documents in appeal No. 110 of 1915) to which this (1st) appellant inter alia was a party. The agreement shortly provided that the widow should take the Rs. 1,000, should adopt the son of the 1st appellant, (authority to her to adopt was given in the will) and withdraw her application for Letters of Administration. The first appellant was a respondent to the application for Letters of Administration though he was not cited. The agreement fell through, the father of the testator did not appear in the proceedings and the widow obtained Letters of Administration. It appears that she subsequently adopted another boy. The present 1st appellant thereupon petitioned for a revocation of the Letters of Administration granted to the widow. This was dismissed both by the District Judge and by the High Court (Ayling and Napier,

JJ.) in A.A.O. No. 132 of 1911 the learned Judges held that no just cause was shown for revoking the Letters of Administration. Several years afterwards two brothers of the 1st appellant in 1916 filed revocation proceedings. Their petition was allowed and the Letters of Administration to the widow were recalled; the 1st appellant was, along with the widow, a respondent to the proceedings. The matter being contentious took the form of a suit (No. 55 of 1917). The first appellant was not a party in his own right and applied to be brought on in I.A. No. 609 of 1919. This was dismissed by the District Judge as he had not objected to the grant originally and his subsequent petition for revocation had been dismissed. He was held not to be a proper or necessary party as he had no power in himself to ask for revocation. In the result the will was upheld and Letters of Administration were ordered to be re-issued to the widow. As a matter of fact this was never done as there was nothing left for the Letters of Administration to operate upon. Further the 1st appellant, as representing the widow would be the person or one of the persons to whom the Letters of Administration would be issued. The question is, can the 1st appellant be now heard to reagitate the whole matter for his own purposes. It has first to be promised that the first appellant is clearly not interested in upsetting the will qua will. His grievance has nothing to do with the disposal of the Rs. 1,000 but with the power of adoption given by the will. He wants to use this means to upset the adoption, made by the widow, and which was not in accordance with the agreement above referred to. It is perfectly clear that the authority to adopt could have been given to the widow otherwise than by the testator's will. The present application is based on Section 50, Probate and Administration Act, and the particular just cause relied on is the second,--the fraud alleged being the concealment of the agreement. I am by no means convinced that it was a duty incumbent on any of the parties to bring this agreement to the notice of the Court in 1908; nor am I convinced on the evidence that is before us that the testator's father failed to appear in the proceedings of 1908 because the agreement was then subsisting. The judgment in No. 132 of 1911 (page 7) shows to my mind that first appellant was aware of the proceedings and also that the agreement had by that time fallen through. The learned Judge there found as follows:--"The respondent's fourth witness's deposition clearly shows that the petitioner was aware of the proceedings during their pendency and such evidence receives support from the unimpeachable evidence of the other witnesses though the latter cannot fix the dates accurately; the compromise attempted and referred to by these witnesses clearly shows that the petitioner was aware of the proceedings while they were pending." In *Nistariny Debya v. Brahmomoyi* (1890) 18 Cal. 45 it was held that the mere absence of a special citation in proceedings in which probate of a will is granted, is not, where the person to whom a citation has not been issued, is otherwise aware of the proceedings, a "just cause" for revocation. I therefore hold that the first appellant was a party to the proceedings in 1908 and is bound by the decision of the Court. The learned Judge has held that the first appellant is debarred from reagitating the matter on account of *res judicata*. It is contended that it has been so held solely on the

ground that first appellant was aware of the proceedings, which was not strictly a suit. Further it will be noticed that the validity of the will has been upheld by this Court, in A.A.O. No. 275 of 1920 (Phillips, J., and myself). There this first appellant put in a memo, of objections wherein he repeated his allegation, that, in view of the agreement, the Court ought to have made him a necessary party, and enabled him to call evidence. He also adopted all the grounds of appeal against the validity of the will filed by the then petitioners (his brothers). It is not disputed that these form his grounds in the present appeal. This memo, of objections was not pressed and was dismissed by us. In my opinion the first appellant is barred by the application of the principle of *res judicata* though the words of Section 11 may not be strictly applicable. The matter has previously been in issue between the parties and the validity of the will has been fully and finally established, and in my opinion it would only be encouraging this protracted litigation to proceed to further lengths to hold the opposite. It is contended that the 1st appellant has up to now not had a chance to present his case. I am unable to agree. He had every chance to attend at the original hearing in 1908. He was heard in 1910 when his application to revoke was dismissed. He did not take steps to dispute the order refusing to make him a party to suit No. 55 of 1917; but he filed as stated a memorandum of objections to the appeal. The Privy Council has held in *Hook v. Administrator General of Bengal* (1921) 48 Cal. 499 that the plea of *res judicata* still remains apart from the limited provisions of the Code, and in *Sheoparsan Singh v. Ramanandam Prasad Singh* (1916) 43 Cal. 694 their Lordships held that the application of the Rules by the Courts in India should be influenced by legal technical considerations of form but by matter of substance within the limits allowed by law. The learned District Judge has further dismissed the appellants' petition on the ground that the judgment of the Court of Probate substantiating the will is a judgment in rem. So long as this is in force it is conclusive not only upon all the parties who may be before the Court, but also upon all other persons, whatsoever, in all proceedings arising out of the will, or claims under or connected therewith, *Sarodakanto Dass v. Gobind Holland Das* (1910) Cri.L.J. 91. It is contended by Mr. Vankatachariar that this conclusive character cannot apply to an attempt to set it aside. He further contended that the argument has no force as the Letters of Administration having been recalled and not re-issued there is in fact no such judgment in existence. In my view this is a fallacy; letters were recalled, but the validity of the will was finally established in suit No. 55 of 1917 and Letters of Administration were ordered to be re-issued. The will must, therefore, be treated as having been valid all through, and it is this judgment in No. 55 of 1917 which has the force of a judgment in rem. It may be that a judgment in rem proved to have been obtained by fraud can be set aside. In my opinion there is no such evidence, here. The validity of the will has been considered ever and over again and has been finally established; and the appellant is under the circumstances of this case bound by that decision. The appeal fails and must be Dismissed with costs throughout.

Wallace, J.

2. The original petition is in substance, though not in terms, an application to revoke the grant of a probate. The first appellant contends that the order granting probate on 13-3-1909 is not *res judicata* against him because first, it was not passed after contention and therefore the proceedings are not of the nature of a suit and therefore Section 11 of the Civ. Pro. Code does not apply, and secondly that, in any case that grant was set aside by an order of the Court on the petition of his minor brothers, and that thereby the order of the Court was revoked. As to the first point it is clear law that any order passed after contention in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it, see *Nuzhatud Dowla Abbas Hussain v. Mirza Kurratuland* (1903) 31 Cal. 168, *Sheoparsan Singh v. Ramanandan Prasad Singh* (1916) 43 Cal. 694 and *Hook v. The Administrator-General of Bengal* (1921) 48 Cal. 499, and it would come within the purview of Section 11 of the Civ. Pro. Code. Now, the appellant was aware of the probate proceedings, had an opportunity to contest but did not choose to contest them: so that, it was owing to his own neglect that the proceedings did not become contentious. It appears to me that he is barred from re-opening the matter any more, and this conclusion is based not so much on Section 11 of the Civ. Pro. Code itself but on the general principle of the Probate and Administration Act that the grant of probate by a competent Court is binding on all persons who had an opportunity of putting forward their objections before it was passed, unless they can make out a good case u/s 50 for setting it aside, Section 50 lays down that for "just cause" the grant of probate of Letters of Administration may be revoked or annulled. There is no period of limitation for putting forward such a cause, since obviously the cause may only appear long after the grant: but it is an elementary principle that, where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would, in my opinion, allow a just cause already agitated and decided upon before the grant of probate to be again made the subject; of an application to revoke that grant, and I see no difference in principle between disallowing such an application on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. So that the question before us, as I view it, is whether the 1st appellant had an opportunity, before the grant was made, of urging the very grounds he now puts forward, or whether he urges any new grounds that have arisen since he had that opportunity which he refused to utilise.

3. I find that he urges nothing new. His petition does not arrange clearly his points of attack or state under which Clause of Section 50 he appeals; but although he does not ask for the revocation of the order of 13-3-1909, his main points of attack seems to me to be (a) that the will was forged, (b) that there was fraudulent conduct of the widow, in reference to an agreement, (c) his ignorance of the probate proceedings, (d) the non-service of summons or citation

on him, (e) attacks on the conduct of O.S. No. 55 of 1917 into which the petition of his minor brothers was converted after their I.A. No. 383 of 1916 was allowed, and (f) the plea that the High Court by recalling the grant in C.M.A. No. 305 of 1917 vacated the original order, so that the whole proceedings are open in this Court. The first four points should have been made grounds of attack before the first grant of probate, for, though no citation was served on him, he was aware of the proceedings. The citation was properly issued and the first appellant had sufficient knowledge of the proceedings--vide High Court's findings in A.A.O. No. 132 of 1911 and in Appeal No. 110 of 1915--and such knowledge was enough to render it incumbent upon him to put forward then any case he had. As to the attack on the conduct of O.S. No. 55 of 1917, it is an irrelevant matter in this petition, as such conduct would have no retrospective effect on the probate proceedings which the 1st appellant now seeks to reprobate.

4. As to the last point some discussion is necessary. The 1st appellant contends that the fact that the grant of probate to the widow under O.P. No. 534 of 1908 was revoked by the District Court in I.A. No. 383 of 1913 on the petition of his brothers" enables him to plead that that grant is not *res judicata* against him, and that therefore the civil suit O.S. No. 79 of 1909 filed by him to set aside the adoption and the suit for partition by the adopted son of the widow, O.S. No. 6 of 1914, should also be allowed to be re-opened since he was not allowed in those suits to challenge the genuineness of the will, because of the previous grant of the Letters of Administration.

5. Now, as has been clearly pointed out in A.A.O. No. 305 of 1917, on the appeal by the widow against the order of revocation, that order was in any case wrong and the proper order was to recall the letters, which had the effect of holding the letters, in abeyance until the contention between the widow and the petitioners in I.A. No. 383 of 1916 should have been tried in the form of a suit as provided by the Probate and Administration Act. The mere recall of the letters does not open to the 1st appellant any fresh opportunity to challenge the original grant, since it is in no way the result of his attack. Any attack by others will not avail to set his attack on its legs again. Section 50, in certain circumstances, would allow one party after another to attack in turn the grant of probate, but nothing in it supports the contention that each of such attacks in turn re-opens all previous attacks and enables parties already defeated to press their attacks anew. There is no substance therefore in this last ground of attack u/s 50, Probate and Administration Act, on the grant of probate on 13th March 1909.

6. The present; 1st appellant applied to be added as a party-defendant in O.S. No. 55 of 1917. That application was refused on the ground that his right to oppose the issue of Letters of Administration had been negatived by the proceedings in 1909 granting Letters of Administration and could not be revived. No Civil Revision Petition was preferred from this order. When against the decree in this suit in favour of the widow the petitioners, in I.P. No. 383 of 1916, appealed to the High Court in A.A.O. No. 275 of 1920, the present 1st appellant did not in the

High Court ask to be brought on record so that he might agitate his right to be made a party-defendant to the suit. That he knew of the appeal is not open to question, since he himself was brought on record in it as the legal representative of the widow who died during its pendency. As such legal representative he put in a memorandum of objections in which incidentally he alleged that the lower Court ought to have brought him on record in his own right, but that memorandum was not pressed and was dismissed. No doubt it was futile to press such a contention in his capacity as the legal representative of the widow, but that forms no excuse for his not himself applying to the High Court to bring him on record in his own right, so that he might contest the refusal of the District Court to make him a party. This is sufficient to dispose of the vague prayers in this petition to declare that the final order in O.S. No. 55 of 1917 and the connected suits Nos. 79 of 1909 and 6 of 1914 are invalid, since it was rightly held in those suits that the petitioner cannot attack the probate proceedings declaring the genuineness of the will or the authority to adopt covered by it. There is no reason for re-opening these suits on the ground that he was wrongly prohibited from agitating these questions : while as regards the allegation of fraud no decree can be set aside on such a ground by mere petition. I am clear that, so far as the 1st appellant is concerned, he has for ever lost his opportunity of challenging the grant, unless he discovers in future some fresh ground for challenge, which he has not up till now put forward. This disposes of the 1st appellant's case.

7. The cases of the other appellants have not been separately pressed. Appellants 2 and 3 are the sons of the 1st appellant and appellants 4 to 6 are the sons of the defendants in O.S. No. 55 of 1917 and obviously cannot re-open that decree by means of this petition. The 7th appellant is the mother of the original testator and has no interest in these proceedings.

8. I, therefore, agree that the petition should be dismissed with costs throughout.