

Manoj Kumar Das Vs. Kakali Das

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Court : Kolkata

Decided On : Sep-06-2017

Judge : Sahidullah Munshi

Appellant : Manoj Kumar Das

Respondent : Kakali Das

Judgement :

IN THE HIGH COURT AT CALCUTTA Testamentary and Intestate Jurisdiction
ORIGINAL SIDE TS92008 IN THE GOODS OF : ASIM KUMAR DAS (DEC) AND
MANOJ KUMAR DAS -VSKAKALI DAS BEFORE: The Hon'ble JUSTICE
SAHIDULLAH MUNSHI Date : 6th September, 2017.

Appearance: Mr.Suman Kumdar Dutt, Mr.Paritosh Sinha Mr.Joydeep Roy
Mr.A.Dey, Adversus Mr.Chanchal Kumar Dutt, Ms.Krishna Mullick, Adversus The
Court : PLA62of 2006 was filed by the propounder plaintiff Sr.Manoj Kumar Das
for having grant of probate on the last Will and Testament dated 24th February,
2005 of Asim Kumar Das (deceased).The probate application has been contested
by the defendant by filing caveat and affidavit in support of such caveat and
subsequently, the proceeding has been treated as a testamentary suit.

Now, the parties have reached a settlement that is to say the defendant agreed
not to oppose the grant of probate.

The settlement has been taken on record.

The Will has been duly proved.

In the settlement one issue has been agreed by both the parties that in the event this Court grants probate then the executor Manoj Kumar Das has agreed not to make any claim in respect of undivided share of the property being 135, Rashbehari Avenue, Kolkata - 700 029.

On the last occasion when the terms of settlement was sought to be filed it was submitted that the probate proceeding may be finally disposed of in terms of the said terms of settlement, this Court did not agree to such submission made by the parties and an objection was raised on behalf of this Court that a probate either to succeed or to be rejected, that is, solely on the basis of the parties able to prove the execution of the Will.

So far as the execution of the Will and the evidence so far adduced, this Court finds that the plaintiff is entitled to the grant of probate in terms of the application.

Now, with regard to the settlement arrived at between the parties, the Court accepts such terms of settlement.

With regard to the relinquishment of the portion of the testators property as mentioned hereinbefore, Mr.Dutt, learned Counsel appearing for the defendant, in whose favour such relinquishment has been proposed to be made, placed before this Court a decision in the case of A.E.G Carapiet Vs.A.Y.Derderian, reported in AIR1961 Cal.359.

Paragraph 28 of the said judgment says that a court of probate is to be a court of consensus which is not to be influenced by private arrangements of the parties.

Therefore, if the principles laid down in paragraph 28 of the said judgment is taken into consideration, the only principle that has been laid down is either the probate court should grant probate or to reject it but court cannot direct that terms of settlement should be treated as part of the judgment or decree.

However, paragraphs 30 and 33 has made certain exceptions with regard to the terms of settlement if relied upon by the parties in a probate proceeding.

The said paragraphs describe the duties of the court with regard to the acceptance of the terms of settlement.

Those paragraphs are reproduced below : Owing to an erroneous view of the law the parties expressed their intentions in an irregular form.

There could be no amended probate as stated in the ekrarnamah but when a testamentary instrument is propounded and a caveat against the grant is entered, it is common practice that opposition to the grant should be withdrawn upon terms. Upon this being done, the promovent proceeds to prove the Will unless probate has already been granted in common form.

In such a case and according to the practice on the Original Side of the Court the caveat is discharged and the grant made.

Such an order is alone within the scope of the suit.

But if a settlement has been arrived at under which opposition has been withdrawn, it is recited in the decree that the parties have agreed to terms of settlement and it is ordered that such terms be recorded.

The terms are then recorded in a schedule annexed to the decree.

Such terms when as they ordinarily are beyond the scope of the suit are not the subject matter of the decree and if not carried out must be enforced by separate suit.

It is argued that in any case no settlement can be arrived at which has the effect of in any way interfering with the disposition of the testamentary instrument of which probate is sought.

But in my opinion this is not so.

Neither the court nor the parties can make for the testator any Will other than that which he has executed.

When however all the parties beneficially interested under that Will consent they can agree to dispose of the estate in a particular manner when it reached heir hands.

In that case they are really dealing with their own property.

Such an agreement may be given effect to either by a redistribution by and amongst themselves after the executor shall have made over the property in terms of the Will or without waiting for such a distribution in conformity with the Will by a direction given by all beneficially interested to the executor to give direct effect to the agreement which the parties have arrived at as to the disposition of the properties given to them by the Will.

Finally, Woodroffe, J.

at page 30 suggested the procedure in this way.

The regular way to effect this was to obtain probate and letters of administration in terms of the Will and to merely record the agreement which if not given effect to would have been enforceable by a separate suit.

Had this been done there would have been nothing illegal in it.

Woodroffe, J.

started blessing the procedure as suggested.

In couRs.of time it became *cursus curiae*.

In Secretary of State for India in Council versus Sm.

Parijat Debi, 63 Ind.

App 61: (AIR 1935 PC203, Judicial Committee appears to have sanctified the same procedure.

It is difficult to find what exactly is sanctified by the Privy Council, but it is taken generally that this procedure suggested by Woodroffe, J.

was the procedure which was approved by the Privy Council.

Sir Lancelot Sanderson delivering judgment of the Privy Council at p.72 (of India App) : (at p.207 of AIR) said : Woodroffe, J.

in the couRs.of his judgement (9 Cal LJ19 referred to the practice on the Original side of the High Court, in a case where probate is granted and terms of settlement are recorded in a schedule annexed to the decree, and said that such terms when they ordinarily are beyond the scope of the suit are not the subject0matter of the decree and if not carried out must be enforced by separate suit.

No doubt that is quite correct, and if this case were a claim by one party to the agreement of March 3, 1928, against another, on the ground that the terms had not been carried out, it would properly be the subject of a separate suit.

(31) Looking at this reference of the Privy Council to the case of Kamal Kumari, 9 Cal LJ19 what was said to be the correct procedure was the procedure of filing a suit in respect of terms of settlement covering extraneous matteRs.but it has been understood in a wider sense as approving the procedure of recording in a schedule of the property of the testator whose Will for probate has been independently considered by the court.

The reason why I say that it was so understood will appear from the two subsequent decisions of this court in Gouri Sankar Dutta v.

Sm.

Hari Bhabini Dutta, 41 Cal WN858(850) and Jagadish Chandra v.

Upendra Chandra, 48 Cal WN294(300).Reference may also be made to the observations of Jenkins, C.J.in Surja Prasad Sukul v.

Shyama Sundari Debi, 14 Cal WN967 where the learned Chief Justice upheld the validity of a compromise filed in this manner in a subsequent proceeding and

which was enforced by a separate suit.

(32) The difficulty of this branch even in the English procedure was clearly pointed out by Yonger, J.

in *In re King, Jackson v.*

Attorney-General, (1967) 2 Ch D420 where at page 432 the learned Judge very pertinently observed : This is not the first time in which this court, as the court of administration, has found it difficult to work out compromises of probate proceedings entered into without full regard to the interests of absent parties.

I hope that the fact that this difficulty has not in the present case, even as regards the individual legatees, materialized will be no encouragement to increase the number, already large enough, of such arrangements. (33) Having regard to this uniform practice we do not wish to deviate from it in the present case so far as the terms of settlement are concerned.

We follow the procedure adopted by Woodroffe, J.

and direct that the probate adopted by Woodroffe, J.

and direct that the probate be granted of this Will and these terms of settlement be recorded with the decree in a separate schedule.

Having regard to such view expressed in the above cited case and in view of the principles laid down by the aforesaid judgment of this Court, I have no hesitation to hold that consequent to the grant of probate in favour of the propounder, the parties at their Will may act on the basis of the terms of settlement which has been filed before this Court and the same may be kept with the record.

It is expected that the parties since have executed certain terms of settlement, the effect of which may be made applicable consequent to the grant of probate, needless to mention that the parties will honour the said terms of settlement.

Since I have already allowed the application for probate, the Department is directed to grant probate which will be effected throughout the State of West Bengal.

The Department is directed to complete and draw up the decree as expeditiously as possible.

TS No.9 of 2010 is disposed of accordingly.

(SAHIDULLAH MUNSHI, J.) sd/

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