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In the Goods of Nanda Lal Sett

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Court : Kolkata

Decided On : Feb-26-1954

Reported in : AIR1955Cal88,58CWN568

Judge : P.B. Mukharji, J.

Acts : Succession Act, 1925 - Sections 227 and 284; ;Calcutta High Court O.S. Rules - Rules 25 and 27

Appeal No. : Suit No. 457 of 1953

Appellant : In the Goods of Nanda Lal Sett

Advocate for Def. : Gorai, Adv.

Advocate for Pet/Ap. : Mazumdar, Adv.

Judgement :
ORDER

P.B. Mukharji, J.

1. This is an application for the discharge of a caveat to the will of Nandalal Sett, deceased, under Ch. 35, Rule 27 of the Original Side Rules of this Court. The application is made by Sm. Basana Dutt, the sole executrix and trustee of the last will of Nandalal Sett deceased, dated 26-12-1052. The applicant applied to this Court on 15-12-1953 for the grant to her of the probate of the will of Nandalal Sett.

The caveator is Gobinda Lal Sett, a brother's son of the deceased testator who filed his affidavit in support of his caveat on 2-1-1954.

2. The reason why the caveat is sought to be discharged is that the affidavit in support of the caveat does not disclose legal grounds of objections to the grant of probate.

3. Under Rule 25 of Ch. 35 of the Original Side Rules the caveat requires to be supported within eight days of the lodging of the caveat, by an affidavit which shall state first the right and interest of the caveator and secondly, the grounds of the objections to the application for the grant of probate. The caveator in his affidavit has disclosed his right and interest as an heir of the testator Nandalal Sett. But the other requirement of Rule 25 of Ch. 35 of the Original Side Rules about the grounds of the objections to the grant of probate is, it is contended, not satisfied by the affidavit in support of the caveat.

The only ground shown is in paragraph 9 of the affidavit of Gobinda Lal Sett in support of the caveat affirmed on 2-1-1954. The ground is taken in these terms:

'In the circumstances aforesaid and in the interest of justice, I submit that the probate should not be granted to the said Sm. Basana Dutt in respect of the trust fund and for properties declared and created by Prosanna Kumar Sett in his will, dated 11-11-1913, but the same should be granted to me as heir of Prosanna Kumar Sett.'

4. To appreciate this objection a brief account of the family history is essential. Prosanna Kumar Seth, a predeceased brother of the testator Nandalal Sett, had made his will on 11-11-1913, the probate of which was granted on 25-4-1917 to the widow of Prosanna as the executrix and sole beneficiary thereunder. Prosanna by his will created a trust of his residuary properties for certain charities with power to her to appoint a trustee. She died without appointing a trustee and the testator Nandalal Sett, as the sole surviving brother and reversionary heir, applied for and obtained from this Court Letters of Administration de bonis non', in respect of Prosanna's estate.

The testator Nandalal Sett by his will appointed the applicant, as the trustee of the trust fund created by Prosanna. The testator claimed to do so by virtue of his position as Administrator 'de bonis non' and in fact, the testator says in his will 'as such Administrator as aforesaid, I am now the sole trustee of the said charitable trust and competent to appoint a trustee to succeed me in that office on my death'. The testator Nandlal Sett by his will appointed the applicant, his grand daughter, not only the sole executrix of his estate but also appointed the applicant by Clause 11 of his will the trustee of Presanna's will, dated 15-11-1913.

5. According to the affidavit in support of the caveat the caveator Gobinda Lal Sett's case is that in the will of Prosanna Kumar Sett, date3 11-11-1913 no provision was made for the appointment of a trustee or trustees and, therefore, the testator Nandalal Sett has no power or authority, express or implied, to nominate and appoint or constitute a trustee or trustees and in every event any such appointment or nomination by the testator Nandalal Sett in his will dated 26-12-1952, is in contravention of the trust declared by Prosanna and as such bad, illegal, inoperative and of no effect. In fact, the allegation is made that the testator Nandalal Sett, deceased, committed a breach of Prosanna's trust by appointing the applicant a trustee of the trust fund created by Prosanna's will.

6. In my opinion, the whole of this affidavit in support of the caveat misconceives entirely the scope and function of an affidavit in support of the caveat required by the Rules of this Court to state 'the grounds of the objections'. The present application is for probate of the will of Nandalal sett, dated 26-7-1952. The grounds of objection in support of a caveat against this will have to disclose materials to show that probate should not be granted to this will. In other words, such an affidavit to support a caveat has to show that that will was not duly or lawfully executed as a will.

The only question germane for the Court to consider at the time of making a grant of the pro-bate of a will are questions relating to the testamentary capacity of the testator whose will has to be probated and the due execution of that will by the testator. Questions of testamentary capacity will obviously cover considerations of physical and mental capacity such as inter alia appreciation of what is being done,

sanity, duress, undue influence, fraud and questions of due execution, will include inter alia such considerations as signature or thums impression of the testator to the will, its proper execution and attestation. They are grounds of objection to the grant of probate.

7. A caveat is simply a warning given by a person having or asserting an interest in the estate of the deceased against the Court issuing any probate without notice to the caveator. It is essential to observe here that a caveat is not a notice to any particular person but is a notice to the Court not to allow proceedings to be taken in the matter of the will of the deceased without notice to the caveator It does not commence litigation nor does it institute proceedings. The whole object of the caveat is to prevent the issue of any grant without notice to the caveator. The main purposes for which a caveat is entered are to give time to the caveator to make enquiries and to obtain such information as may enable him to determine whether or not there are grounds for his opposing the grant or to give him an opportunity of raising any question arising in respect of the grant of probate or to enable the caveator to apply for an order that the sureties of the administration bond shall justify or as a step preliminary to an action or to the issuing of citation.

That is how the learned Editors of the 19th Edition of Tristraun & Coole's Probate Practice state the law at page 387.

The form of a caveat under the Indian Succession Act as provided in Schedule 5 thereof under Section 284(4) of that Statute or the form of the caveat in the High Court as provided in Form 12 under Rule 24 of Ch. 35 makes it abundantly clear that a caveat is nothing more than a warning. The form of the caveat either under the Indian Succession Act or under the Rules of the High Court does not stipulate that grounds of objection should be stated in the caveat. Under the procedure laid down in the Indian Succession Act nothing follows upon the filing of a caveat except the caveator becomes entitled to notice before the grant, the object being that he get an opportunity to appear and contest the grant.

8. There is no procedure under the Indian Succession Act requiring an affidavit in support of the caveat to disclose the grounds of objection to the grant. This is where the procedure relating to grant of probate in this High Court is different from

that under the Indian Succession Act. Under the Rules of the Original Side of the High Court the caveator has to file an affidavit which must not only disclose his right and interest in the estate of the deceased testator, but also the grounds of objection.

The penalty for not making the requisite affidavit within the time specified by the rules is discharge of the caveat itself. If a proper affidavit disclosing the right and interest of the caveator as well as the grounds of objection to the grant is made in support of the caveat within the time laid down, then the next stage is reached by marking the matter as a 'contentious cause' where the petition for probate is regarded as a plaint and the affidavit of the caveator as written statement and the 'contentious cause' is thereafter heard as a suit. The matter comes up before me before the stage of being a contentious cause. It is said that before it is marked as a contentious cause, the caveat should be discharged on the grounds that I have already stated.

9. What is attempted to be done in this case is not to say that the testator had no testamentory capacity to make the will or that in fact |it was not duly executed, but only that a particular provision in the will of Nandalal Sett can-not be given effect to as being in breach of trust created by Prosanna. That is the only ground disclosed in the affidavit in support of the caveat. It is not, in my view, a ground of objection at all to the grant of probate of the will of the testator Nandalal Sett. It is at least an objection about the construction of that provision in the will of the testator Nandalal Sett and its effect. That is not a ground on which the probate of this will can be refused.

10. Mr. Majumdar has relied on the decision in -- 'Durga Pada Bera v. Atul Chandra Bera : AIR1937 Cal595 . That is a Bench decision of this Court where the well-known principle is laid down that the grant of probate is decisive only of the genuineness of the will and of the right of the person to whom the grant is made, to represent the estate. Such grant is no bar to the determination of any question of title or to a suit for construction of the will.

This conception of what the probate of a will means is frequently the cause of a good deal of confusion about the procedure in respect of pro-bate. What is after all

a probate of the will? The probate of a will is in the nature of a certificate of the court stating first that the last will of the testator has been proved before the court and secondly, that the administration of the property and credit of the deceased and in any way concerning his will is granted to a particular individual, usually the executor in the will coupled with a record of an undertaking by such grantee of the probate to administer the estate and to make a full and true inventory of the property and credits of the deceased and exhibit the same in court within, six months from the date of the grant or within such further time as the court may from time to time appoint and also to render to the court a true account of such property and credits within one year from such date or within such further time as the court may from time to time appoint. The probate does nothing more.

It neither settles construction of the provisions contained in the will nor decides questions of title to the properties covered by the will, A very recent decision on the original side of this Court is -- 'Kasi Bai v. Gobind Lal', ILR (1949) 2 Cal 88 (B), says after a review of authorities, both English and Indian, that in probate proceedings it is completely outside the province of a court to determine any question of title to the properties covered by the will or to construe the provisions of the document sought to be probated except for the limited purpose of determining its dispositive effect.

11. Therefore, in that view of the law, the opposition on behalf of the caveator that the interest of the trust fund created by the will of Prosanna will be in jeopardy cannot be sustained as a ground for refusing the probate of Nandalal's will, nor' the contention that the testator had no power to appoint a trustee can be regarded as at all a relevant question at this stage in deciding whether probate should be granted or not to the will of the testator Nandalal Sett. The caveator's interest, if any, is not in danger by the grant of this probate.

He has every remedy either by way of a construction of the will in question or by way of a suit or any other appropriate proceedings to protect the estate of Prosanna Kumar Seth which he is supposed to be anxious to do. But that is no reason why this court should not grant probate of the will of Nandalal Seth, which is the only question before the court on this application at this stage.

12. For these reasons I am satisfied that the affidavit filed in support of the caveat in the case does not meet the requirement of Rule 25 of Ch. 35 of the original side Rules of this Court in so far as it has failed to disclose 'grounds of the objections to the application'. Such affidavit is, therefore, not in compliance with Rule 25 of Ch. 35 of the Original Side Rules. The consequence of the caveator's failure to file an affidavit in compliance with Rule 25 is discharge of the caveat itself as provided in Rule 27 of Ch. 35 of the Original Side Rules.

13. There will, therefore, foe an order discharging the caveat and granting probate of thewill of the deceased testator Nandalal Sett tothe applicant. As the entire opposition on behalfof the respondent is misconceived in law, the respondent must pay the cost of this applicationwhich is certified for counsel.

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