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Court : Kolkata

Decided On : Mar-20-1944

Reported in : AIR1944Cal385

Appellant : Kailash Chandra

Respondent : Nanda Kumar

Judgement :
ORDER

1. This Rule is directed against an Order of the District Delegate of Bagerhat, in the District of Khulna, dated 8th June 1943, rejecting an application of the petitioner for revocation of a probate, under Section 263, Succession Act. The facts so far as they are material for our present purposes may be stated as follows: The opposite parties are executors under the will of one Prokash Chandra Mandal applied for and obtained ex parte a grant of probate of the said will from the District Delegate at Bagerhat. The grant was made on 2nd February 1938 and on 22nd December 1938, the petitioner, who is a brother of the deceased and but for the will would have inherited half of the estate left by him, presented an application before the same District Delegate for revocation of the grant, on grounds inter alia that no citation was issued on him and that the will of which probate was obtained was a forged will. Before the opposite party received any notice of this proceeding, the application was dismissed in the absence of the petitioner on 14th January 1984. The Order recorded by the District Delegate stands as follows:

The pleader of the petitioner called for but not found. It seems to me that the applicant should proceed by a regular suit. The application is therefore summarily rejected.

The petitioner thereupon filed a suit in the ordinary way in the Court of the Munsif at Bagerhat, for setting aside the ex parte grant of probate. The Munsif returned the plaint on the ground, that the value of the subject, matter of the suit was beyond his pecuniary jurisdiction. The petitioner says that he was then advised by his pleader, that his proper remedy lay not in a suit, but in an application under Section 263, Succession Act, and accordingly he filed a fresh application for revocation of probate under that section in the Court of the District Delegate at Bagerhat. The allegations were practically the same as in the earlier application, viz. (1) that the grant was obtained by suppression of processes and no citation was issued on the petitioner, and (2) that the will which was probated on the application of the opposite parties was a forged one. The District Delegate by his Order dated 8th June 1943, rejected this application. It was held inter alia that the Order dismissing the previous application for revocation operated as a bar to the present proceeding, and that as the petitioner came with the allega-tion that the will itself was forged, his proper remedy was to file a suit in the ordinary way. The District Delegate found on evidence that there was no suppression of processes in the probate proceeding, and notice was in fact served on the petitioners. He however did not investigate the point as to whether the will was forged or not. It is against this Order that the present Rule has been obtained.

2. The learned advocate appearing in support of the Rule has contended before us that the District Delegate had no jurisdiction to hear an application for revocation of probate and that his duty was to return the application for being presented to the Court of the District Judge. This proposition was controverted by Mr. Guha who appeared on behalf of the opposite parties and he has contended further, that the District Delegate was right in holding that the proper remedy of the petitioner in a case like this was to file a suit. Mr. Guha made no serious attempt to support the decision of the District Delegate on the other point, viz., the Order of dismissal in the previous revocation case operated as a bar to the present proceeding, and he conceded further that if the remedy of the petitioner lay in an application and not a

suit, it was incumbent upon the District Delegate to investigate the question as to whether the will was a forged one or not. It seems clear to us that the Court below was not right in holding that the Order dismissing the previous application for revocation operated as a bar to the present application on the principle of res judicata. The Order was made in the absence of both parties and nothing was heard or decided, At best the Order of dismissal could be: regarded as one made under Order 9, Rule 3 read with Section 141, Civil P.C. and obviously it could not bar a second proceeding. The fact that the Court expressed an opinion regarding the maintainability of the application is in our opinion quite immaterial and does not alter the character of the Order that was actually made. The points which really arise for consideration in this Rule are two in number, viz. (1) whether the application for revocation in the present case could be heard and decided by the District Delegate and (2) whether the District Delegate was right in holding that as the petitioner sought revocation inter alia on the ground that the will was a forgery his. remedy was to file a suit. So far as the first, point is concerned, the relevant provisions of law are to be found in Sections 264 and 265, Succession. Act. Section 264, states that

the District Judge shall have jurisdiction in granting and revoking probate and letters of administration in all cases within his district.

Section 265 then lays down that

the High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters-of administration in non-contentious cases, within such local limits as it may prescribe; Provided that, in-the case of High Court not established by Royal Charter, such appointment shall not be without the previous sanction of the Local Government.

3. Thus it is the District Judge that constitutes the probate Court and as such has the jurisdiction in the matter of granting and revoking probate. It is only in non-contentious, cases that the power of granting probate and letters of administration can be delegated to the officers appointed under Section 265. Section 288 lays down the procedure that has to be followed by the District Delegate when the

proceeding becomes a contentious one. It will be noticed that Section 264 which relates to the powers-of the District Judge speaks both of granting: and revoking probates and letters of administration whereas Section 265, which deals with District Delegates speaks only of granting 'probate-and letters of administration and says nothing: about revocation of grants. It is quite pertinent to argue that this omission is deliberate-and that the intention of the Legislature was-that the function of revoking grants could not at all be delegated to District Delegates. Mr. Guha argues that the power of revoking probate is implied in that of granting probate, and a Court which made the grant is alone competent to revoke it. Taking this contention to be sound, a revocation proceeding can be brought within the purview of Section 265, Succession Act only as a part or continuation of the probate proceeding. But the District Delegate is not given any jurisdiction to decide a contentious probate matter and unless a proceeding for revocation of a grant is a non-contentious proceeding the District Delegate could exercise no jurisdiction with regard to it. To us it seems, that an application for revocation of probate is a contentious matter from its very inception, and that is probably the reason why it was not included in Section 265, Succession Act. But even if there is nothing wrong in filing the application for revocation before the District Delegate when the probate was granted by him, we think that the District Delegate is bound to return the petition in accordance with the provision of Section 288, Succession Act, as soon as the other side enters appearance and the proceeding be-comes contentious. We cannot accept the argument of Mr. Guha, that whether or not the revocation proceeding is contested, the District Delegate would have jurisdiction to revoke the grant, provided the original probate proceeding was a non-contentious one. This view if accepted would lead to anomalous results and the position would be that the District Delegate would be competent in the revocation case to pronounce a will to be spurious which he could not do in the probate application itself. Our conclusion therefore is that the District Delegate could not, in the present case hear and decide the application for revocation of probate and that the petition ought to have been returned to the petitioner to be presented to the Court of the District Judge.

4. On the other point we have no hesitation in holding that the Court below was not right in saying that as the petitioner wanted to have the probate revoked on the

ground that the will was a forgery his remedy was to file a civil suit, and not an application under Section 263, Succession Act. Section 263, Succession Act, provides that the grant of probate or letters of administration may be revoked or annulled for just cause. The explanation states inter alia that just cause exists where

(b)the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case, Or (e) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant....

Illustration (iii) appended to the section makes it quite clear that forgery of the will is a just cause for revocation.

5. Thus even when there is allegation of forgery, the proper remedy would be to file an application under Section 263, Succession Act, and that seems to be the exclusive remedy provided by the Act. Of course in all such proceedings the provisions of the Civil Procedure Code will apply as far as practicable and we may go so far as to say that the proceeding takes the form of a suit (vide sSection 268 and 295, Succession Act), but it is absolutely incorrect to say that the proceeding must be initiated by a plaint, and it will be a suit under the provisions of the Civil Procedure Code. In the goods of Mahendra N. Roy (1900) 5 C. W. N. 377, is one of the earliest pronouncements on the point and Sale J., held, and, in our opinion, quite rightly that to revoke a grant of probate on the ground of forgery, the proper course is to make an application under Section 50, Probate and Administration Act (corresponding to Section 263, Succession Act). The learned Judge relied in this connection upon the observa-tions of Markby J. in Komollochun Dutt v. Nilruttan Mondal ('79) 4 Cal. 360, Harring-ton J., however, in a case which came up for decision only a few months after this case was decided: In the goods of Harendra Krishna Mukherjee ('01) 5 0. W. N. 383, expressed his opinion that the decision in Komollochun Dutt v. Nilruttan Mondal ('79) 4 Cal. 360, was no authority for the proposition that a grant of probate cannot be revoked by a regular suit instituted for the purpose.

6. The learned Judge held indeed, that no other Court other than the Probate Court could revoke the grant, and he seemed to be of opinion that a regular suit for revocation ought to be instituted in the Probate Court itself. This is the solitary authority upon which Mr. Guha based his contention regard, ing this part of the case. It seems to us that Harrington J. in laying down the law as stated above was influenced to a great extent by the form of plaint, laid down in Form No. 115 (2) in sch. IV, part E., Civil P.C. of 1882. That was the form which was to be used by an executor, legatee or next of kin seeking to obtain revocation of probate in cases in which the claim for revocation was filed on the allegation that the will was not the true will of the testator. The learned Judge however did not consider whether that form could be availed of by the litigant, after the Probate and Administration Act came into force. At any rate this form was omitted from the subsequent Code and cannot now be relied upon as throwing any light on this point. On the other hand Banerjee and Stevens JJ. held in a still earlier case Pratap Chandra v. Kali Bhanjan (1900) 4 C. W. N. 600, that a proceeding instituted for revocation of probate could not be regarded as a regular civil suit. It was a miscellaneous proceeding which did not even attract the operation of Section 83, Probate Act (Section 295 of the present Succession Act). In Sarada Kanta v. Gobinda Mohan ('10) 12 C. L. J. 91, it was held by Mookherjee and Carnduff JJ. that a proceeding for revocation of a probate was not a suit within the meaning of Order 23, Rules 1 and 3, Civil P.C. Almost all the relevant decisions on the point have been reviewed by Panckridge J. in Panna Lal v. Hansraj : AIR1940 Cal236 and it has been held that the High Court in its ordinary original civil jurisdiction cannot entertain a suit for revocation of a grant of probate made in its testamentary jurisdiction on the ground that the will is not a genuine will. We are in entire agreement with the learned Judge when he says, that quite apart from authorities the same conclusion is arrived at if we regard it from the point of view of principle. The judgment of a Court of Probate is a judgment in rem and binds all the world. The judgment in a civil suit is operative only between the parties to the suit. It is difficult to see therefore how a judgment in rem can be revoked or set aside by a judgment which is only conclusive inter partes In our opinion therefore even when there is allegation of forgery, the proper remedy of the party who wants revocation of a grant of probate, is to apply to the Probate Court under Section 263, Succession

Act, and not to file a civil suit. The result therefore is that the Rule is made absolute. The Order of the Court below is set aside, and the District delegate is directed to return the application for revocation to the petitioner to be presented to the Court of the District Judge. As the petitioner did not raise the question of jurisdiction in the Court below, we direct that each party would bear his own costs in this Court as well as in the Court below.

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