

Phanindra Chandra Vs. Nagendra Chandra and ors.

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Court : Kolkata

Decided On : May-04-1922

Reported in : AIR1925Cal75

Appellant : Phanindra Chandra

Respondent : Nagendra Chandra and ors.

Judgement :

Mookerjee, J.

1. F.A. 51 of 1921. This appeal is directed against the grant of probate of a Will alleged to have been executed by one Pannamoni Dassi on the 18th December, 1918 and registered on the 12th February, 1919. The lady died on the 18th August, 1919. An application was made on the 6th February, 1920 for probate of the Will by two of her sons (who are named as executors) in the Court of the Subordinate Judge and district delegate. On the 20th March, 1920 a petition of objection supported by an affidavit was filed by another son of the testatrix, who is now the appellant before us. Thereupon the case was treated as contentious and was transferred to the District Judge. On the 7th May, 1920 an order was recorded to the effect that the application should be treated as a contentious probate case. A written statement was filed by the objector on the 8th June, 1920, On the 21st June, 1920 the pleaders of both sides were heard and the following issues were framed: (A) 'Was the will duly and legally executed by Sm. Pannamoni Dasi and

was she in her full senses and possessed of free disposing capacity at the time? (B) Was the will executed as a result of undue influence exercised upon Sm. Pannamoni Dasi by the brothers of Phanindra defendant? The case was taken up for final disposal on the 26th November, 1920. The objector applied for adjournment on the ground that it was necessary for him to have his wife examined on commission. The Court refused the application. Thereupon the pleader for the objector stated that he withdrew from the case. The District Judge proceeded to hold that the case became undefended and the Will might now be proved in common form. An affidavit) was filed by the petitioners with regard to the execution of the will. The following, order was then passed: ' Will proved. Let Probate be granted.'

2. The propriety of this order is assailed on the ground that probate should not have been granted as in a non-contentious case. This argument raises a question of first impression. 'We have to determine whether the proceedings which were undoubtedly contentious ceased to be contentious when the pleader for the objector withdrew from the case; and whether thereafter it was competent to the Court to deal with the application as in a non-contentious case and to grant probate in common form. We are of opinion that the procedure adopted in the Court below is not authorised by law.

3. Section 73 of the Probate and Administration Act provides that a District Delegate shall not grant probate or letters of administration in any case in which there is a contention as to grant or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

4. An explanation is added in the following terms: 'By contention is understood appearance of any one in person or by his recognised agent or by a pleader duly appointed to act on his behalf to oppose the proceedings.'

5. The essence of contention consequently is appearance with a view to oppose the proceedings. There was such appearance in the case before us when objection was first taken before the District Delegate and the proceedings which thereupon became contentious undoubtedly continued to possess that character till the 26th November, 1920. The question for consideration is, whether the

withdrawal of the pleader from the case transformed the proceeding into a non-contentious proceeding. We are of opinion that the answer must be in the negative.

6. Section 83 of the Probate and Administration Act provides that in any case before the District Judge in which there is contention the proceeding shall take, as nearly as may be, the form of a suit according to the provisions of the Code of Civil Procedure in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff and the person who may have appeared as aforesaid to oppose the grant shall be the defendant. Consequently when there was a contention before the District Judge the proceeding took the form of a suit and the suit had to be tried in accordance with the provisions of the Civil Procedure Code. This view is in accord with the opinion expressed by Mr. Justice Strachey in the case of *Chotalal Chunilal v. Rai Kabubai* (1897) 22 Bom. 261:

In England there is a machinery by which, even after a writ of summons has issued, an order may be obtained for discontinuance of contentious proceedings and for the grant of probate in common form. In India there is no such machinery and a probate matter, which has once become a suit, can only be disposed of like other suits. A relief prayed for in the plaint can only be granted by the Court, and in a petition for probate or letters of administration the relief prayed for is that probate or administration may be granted. It follows that where at the hearing of the suit, the defendant does not appear in support of the caveat it is not, in my opinion, a correct procedure; for the Court is merely to die-miss the caveat leaving it to the Registrar to dispose of the petition as a non-contentious matter. In such a case I think the proper form of order is that the caveat be dismissed, and that probate or letters of administration issued, provided that the Court be satisfied, that the papers are in order, and in the case of probate, of the due execution of the will.

7. In the present case the effect of the withdrawal of the pleader was not to convert the contentious proceeding which had assumed the character of a suit into a non-contentious proceeding but to make the suit an undefended suit.

8. In an undefended suit, the plaintiff is not entitled to succeed merely because the defendant has not opposed the claim. The Court in passing the decree must be

satisfied on the evidence produced before it that the claim is well founded. Consequently in a case of this description probate cannot be granted in common form. The distinction between a probate in common form and a probate in solemn form is well-known. A probate in common form is issued where the validity of the will is not contested or questioned. The executor proves the will either before the District Judge or the District Delegate competent to grant it in the absence of the parties interested upon his oath or upon 'such further evidence as may be required. Probate in solemn form is obtained by the executor in an action in which the persons prejudiced by it have been made parties and the Court, upon hearing the evidence, pronounces for the validity of the will. This distinction appears to have been overlooked in the Court below. We may point out that in the rules which were framed by this Court in 1907 in view of the decision in *Ramgopal Das v. Radha Krishna Das* (1906) 10 C.W.N. 95 (N), it was provided that in uncontested proceedings under the Probate and Administration Act, 1881, it shall be competent to the Court or the Judge exercising jurisdiction therein to permit or direct, except when otherwise provided for by any law or rule for the time being in force that any particular fact or facts may be proved, or evidence upon and application may be given, by affidavit. This applies to uncontested proceedings. The case before us does not fall within that description. The essence of the matter is that the withdrawal of the pleader from the proceeding does not mean the withdrawal of the opposition to the grant of probate.

9. The result is that this appeal is allowed, the order for grant of probate made on the 27th November, 1920, set aside and the case remanded to the District Judge to be re-tried in accordance with law. Costs will abide the result. We assess the hearing-fee at three gold mohurs.

M.A. 52 of 1921.

10. In view of the fact that the order for grant of probate has already been set aside it is not necessary for us to proceed with this appeal. It is therefore dismissed.