APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

1914

July 6.

MANORAMA CHOWDHURANI

v.

SHIVA SUNDARI MOZUMDAR.*

Probate—Revocation—Will, validity of—Proof in common form—Knowledge—Acquiescence—Delay—Probate and Administration Act (V of 1881) s. 50.

It does not matter by what facts knowledge of the grant of probate and acquiescence in it are established, for neither knowledge, nor acquiescence, nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring, if he was not made a party in the probate proceeding. His application must be *bonâ fide* and he must give some reasonable and true explanation of the delay.

Hoffman v. *Norris* (1), *Merryweather* v. *Turner* (2) and *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (3) referred to.

APPEAL by Srimatee Manorama Chowdhurani, the petitioner.

This was an application under section 50 of the Probate and Administration Act, 1881, to set aside a probate and to call on the probate-holders to prove the will in solemn form. There were two brothers, Gobinda Chandra Das Mozumdar and Banga Chandra Das Mozumdar, who lived together in common mess. Banga, the younger brother, predeceased Gobinda, leaving as his heirs his wife and two minor sons, Sasi and Kamini, born respectively in 1872 and

* Appeal from Original Decree, No. 270 of 1911, against the decree of A. H. Cuming, District Judge of Noakhali, dated May 15, 1911.

(1) (1805) 2 Phillim. 230. (2) (1844) 3 Curt. 802.
(3) (1910) 14 C. W. N. 1068.

1883. On the 27th or 28th December 1883, Gobinda Chandra died in a boat from cholera, after having executed a will on the 27th December 1883. He left him surviving a widow, Shiva Sundari, and five unmarried minor daughters. Thereafter, Shiva Sundari and her sister-in-law with their children continued to live together in joint mess. The testator's eldest daughter, Kusum Kumari, was born in 1869, his second daughter, Kumudini, in 1871, his third daughter, Manorama, who was the petitioner in this case, in 1876, his fourth daughter, Kadambini, in 1880 and his fifth daughter, Swarnalata, some time before the testator's death. Under the terms of the will, the widow got a life-estate with remainder to the brother's sons, and the daughters were given an allowance of Rs. 12 a year each for maintenance. Of these daughters, the youngest was dead. Manorama was married and had male issue and the other three were childless widows. On the 20th March, 1884, Shiva Sundari took out probate of her deceased husband's will, alleging in her petition that she was the executrix and legatee of the will and praying for grant of probate of the will or, in the alternative, for letters of administration to the estate of the deceased. In 1886, her confidential servant and manager, one Kali Kanta Biswas, filed this will in a rent suit, and it was subsequently returned to him. In 1887, Manorama was married, and at the time of her marriage her father's will was read out to her husband and to herself. Various receipts for the allowance of Rs. 12 for maintenance in terms of the testator's will were granted for different periods by Kusum Kumari, Kumudini and Kadambini, and the petitioner herself in 1901 gave a receipt for Rs. 200, being arrears of her maintenance for sixteen years and nine months, from 1885 to 1901. In 1909, Sasi and Kamini brought a suit for

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account against Kali Kanta Biswas, who was managing affairs for Shiva Sundari and their mother, and they made Shiva Sundari a defendant in that suit. Thereupon, Shiva Sundari separated from her sister-in-law and Sasi and Kumari went over to the side of the petitioner and her husband. In 1910, the petitioner filed the present petition alleging, *inter alia*, that the will was forged and that probate was fraudulently obtained by her mother, Shiva Sundari, without the issue of citations and the appointment of any guardian *ad litem* of the minors interested in the inheritance under the will, and made Shiva Sundari alone a party. Upon this Sasi and Kamini filed their objections, stating that the petition was fraudulent and collusive and got up by Shiva Sundari, and that the petitioner was precluded by acquiescence and delay from praying for revocation of the probate. The District Judge dismissed the case. Thereupon, the petitioner appealed to the High Court.

Babu Dwarkanath Chuckerburty and *Babu Ramesh Chandra Sen*, for the appellant. By the will the testator's daughters were practically disinherited and probate must be revoked. The first objection to the probate was that the testator's widow was not appointed executrix under the will, either expressly or by necessary implication, and her allegation in her application for probate, that she was appointed executrix, was an untrue allegation of a fact necessary in law to justify the grant of probate and not merely a technical defect. Then again, the will was a forgery and probate had been granted *ex parte* without the issue of citations on the petitioner or on any of her sisters, who were all minors at the time and on whose behalf no guardian *ad litem* had been appointed to represent them in the probate proceeding. There was a

sufficient *primâ facie* case to justify an enquiry and the petitioner was entitled to call upon the probate holder to prove the will in solemn form: see *Walter Rebells* v. *Maria Rebells* (1), *Brinda Chowdhrain* v. *Radhica Chowdhrain* (2), *Shoroshibala Debi* v. *Anandamoyee Debi* (3) and *Etokeshi Dassi* v. *Hurry Prosad Soor* (4). Neither delay, nor acquiescence, nor even receipt of legacy would preclude the next of kin from calling upon the executrix to prove the will in solemn form: see *Merryweather* v. *Turner* (5), *Bell* v. *Armstrong* (6) and *Core* v. *Spencer* cited therein (7), and *In re Sarah Topping* (8). The cases of *Kunja Lall Chowdhury* v. *Kailash Chandra Chowdhury* (9) and *Hoffman* v. *Norris* (10) were not applicable. In those cases there was some collateral litigation in other Courts, to which the petitioner had been a party and the petitioner was in consequence aware of, or had acquiesced in, the grant of probate. In the present case the circumstances were different. There was an intermediate life interest of the petitioner's mother, who was still alive, and the petitioner's right had not accrued, and no question of delay could arise. Morover, most of the attesting witnesses were alive and there would be no difficulty in establishing the will.

Mr. Caspersz (with him *Mr. Anis Yusuff* and *Babu Upendra Kumar Roy*), for the respondents, relied on the following cases: *Kali Das Chuckerbutty* v. *Ishan Chander Chuckerbutty* (11) *Koster* v. *Sapte* (12) *Blake* v. *Knight* (13) *Kunja Lal Chowdhury*

(1) (1897) 2 C. W. N. 100.
(2) (1885) I. L. R. 11 Calc. 492.
(3) (1906) 12 C. W. N. 6.
(4) (1903) 7 C. W N. 450.
(5) (1844) 3 Curt. 802.
(6) (1822) 1 Addam 365.
(7) (1796) 1 Addam 374.
(8) (1853) 2 Rob. Ecc. 620.
(9) (1910) 14 C. W. N. 1068.
(10) (1805) 2 Phillim. 230.
(11) (1904) I. L. R. 31 Calc. 914; 9 C. W. N. 49.
(12) (1838) 1 Curt. 691.
(13) (1843) 3 Curt. 547.

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v. *Kailash Chandra Chowdhury* (1) and *Nalini Sundari Gupta* v. *Bijoy Kumar Roy Chowdhury* (2). Much shorter delay than that in the present case has been held to disentitle a petitioner to revocation of probate. Where such an application was made, especially after long lapse of time, the Court had the right to ask the petitioner to be perfectly candid and would refuse the application unless weighty reasons were shown for the revocation. The following cases also were referred to: *Merryweather* v. *Turner* (3) *Hoffman* v. *Norris*(4) and *Musammat Jagrani Koer* v. *Kuar Durga Parshad*(5).

Babu Ramesh Chandra Sen, in reply. In *Kali Das Chuckerbutty* v. *Ishan Chandra Chuckerbutty*(6) the Privy Council did not refuse revocation on the ground of delay and in *Nalini Sundari Gupta* v. *Bijoy Kumar Roy Chowdhury*(7) this Court did not decide anything, the case being remanded for further evidence. This was not a suit in equity, the decree in which would be binding only on the parties. The judgment of the Probate Court was a judgment *in rem* binding on the whole world and Courts were very vigilant in seeing that probate of a forged will was not granted. In such a case as the present the laches of a party were immaterial. Moreover, the petitioner had never by any act or omission led any Court at any time to declare in favour of the will. There was, therefore, nothing to disentitle her to apply for revocation of the grant.

Cur. adv. vult.

(1) (1910) 14 C. W. N. 1068.
(2) (1911) 11 Ind. Cas. 277.
(3) (1844) 3 Curt. 802.
(4) (1805) 2 Phillim. 230.
(5) (1913) 18 C. W. N. 521; 19 C. L. J. 165.
(6) (1904) I.L.R. 31 Calc. 914; 9 C. W. N. 49.
(7) (1911) 11 Ind. Cas. 277.

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HOLMWOOD AND CHAPMAN JJ. This was a suit for revocation of probate of the will of one Gobinda Chandra Das Mozumdar calling upon the executor to prove the will in the presence of the petitioner.

The testator died on the 27th or 28th December 1883 of cholera in a boat and the will was said to have been executed on the 27th December 1883. He left a widow and five minor daughters unmarried as well as two brother's sons, the objectors in this case, who were then also minors. By the will the widow got a life estate with remainder to the brother's sons, and the daughters were given allowance for maintenance of Rs. 12 a year each. The petitioner, Manorama Chowdhurani, is the only one of the daughters who has borne sons, and she claims to come in because admittedly although general citations were issued and her mother obtained probate of the will, no separate guardian *ad litem* was appointed to represent the minor daughters or the minor brother's sons in the probate proceeding. The eldest daughter, Kusum Kumari now a childless widow, was born about 1869; the younger brother's son, Sasi Mohan Das Mozumdar, was born in 1872; the 2nd daughter, Kumudini, was born in 1871; the petitioner was born in 1876; the fourth daughter, Kadambini, was born in 1880, and the younger brother's son, Kamini Mohan Mozumdar, was born in 1883. The fifth daughter is dead.

It is fully established by evidence that Shiva Sundari, the widow of the testator, took out the probate on the 20th March 1884, and in a rent suit in 1886 the will was filed by her confidential servant, Kali Kanta Biswas, and returned to him. In 1887 the petitioner then 11 years of age was married, and there is evidence that the will was read out to her husband, a pleader's clerk, who has since become a vernacular copyist in the Munsif's Court at Lakhipur and herself at the

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time of the marriage. In accordance with the terms of the will, Kusum Kumari one of the daughters gave receipts for her allowance to her mother in 1887 and to her mother and Khuri the mother of the objectors jointly for the years 1888 and 1891. Two subsequent receipts of hers, the first given to her mother and Sasi Mohan jointly and the second to her mother alone, have also been produced. Receipts of a similar nature granted by Kumudini for 1890 and 1901 are produced and from Kadambini for 1903. But the most important document is the receipt given by the petitioner herself in 1901 for Rs. 200, being the arrears of her maintenance for 16 years from 1885 to 1900 and three quarters of her allowance of 1901. All these receipts clearly recite that her father Gobinda before his death executed a will on the 13th Pous 1290 and in the said will he made directions for payment of Rs. 12 annually to the recipient as allowance out of the profits of the estate. In 1909 the objectors, Sasi Mohan and Kamini Mohan, had occasion to bring a suit for accounts aganist Kali Kanth Biswas who was managing for Shiva Sundari and for their own mother and they made Shiva Sundari a defendant also. This appears to have annoyed Shiva Sundari who separated from her sister-in-law and the objectors and went over to the side of the petitioner and her husband and in 1910 this petition was brought making Shiva Sundari alone a party. Upon this the objectors came in and said that the petition was fraudulent and collusive and got up by Shiva Sundari. At the trial Shiva Sundari and all the surviving daughters denied the will altogether and denied they had received any allowance and supported the petitioner in her allegation that she had no knowledge of the will of her father or of the probate case until Kartic 1316 when she went to visit her father's house.

As regards the facts, we may at once say that we have carefully perused the documents and can have no doubt that the receipt Ex. A is in the handwriting of the petitioner herself, and the other receipts are genuine. Numerous specimens of the handwriting of the ladies have been produced in the shape of affectionate letters and post-cards written by them to the objectors and to their own mother, the authenticity of which cannot for one moment be doubted, though the witnesses of the petitioner have had the audacity to deny all knowledge of them. It is clear from the correspondence that up till 1909 the sisters were on the most affectionate terms with their cousins, the objectors. One of the letters speaks of the objectors as the only hope of carrying on their father's name.

We, therefore, find two main facts against the petitioner: *first*, that her petition is not *bonâ fide* but collusive and fraudulent, made solely as an answer to the suit for accounts against their mother and her agent; and, *secondly*, that no resonable account is given of the circumstances which entitled the petitioner to reopen the probate after so many years. The account she does give is entirely false, and as Shiva Sundari herself undoubtedly obtained the probate and they knew of it and acquiesced in it for many years they must on the authorities give some good and true reason why they had not proceeded earlier. This doctrine is clearly laid down in *Hoffman* v. *Norris* (1) which was cited with approval in *Merryweather* v. *Turner* (2) where it was stated that the ground or principle upon which the Court proceeded in *Hoffman* v. *Norris* (1) was that the petitioner was not barred by lapse of time, if he can show good reason why he did not proceed at the

(1) (1805) 2 Phillim. 230. (2) (1844) 3 Curt. 802, 813.

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earlier period; but if he does not show good cause the Probate Court will not allow him to call in the will after such a lapse of time. The same view has been taken by this Court in *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (1).

It is urged that in all these cases there had been collateral litigation in other Courts to which the petitioner had been a party and was thereby saddled with knowledge and acquiescence. But it does not seem to us to matter by what facts such knowledge and acquiescence are established, for neither knowledge, nor acquiescence, nor lapse of time, are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring if they were not made parties in the probate proceeding. What is held is that where knowledge, acquiescence and lapse of time are shown, the petitioner must give some reasonable and true explanation of the delay; or, in other words, the application must be made *bonâ fide*.

We are of opinion, apart from all authority, that our finding that this petition is a dishonest and vindictive proceeding supported by false evidence and not putting the true facts at all before the Court, is certainly a bar to the reopening of the probate obtained 30 years ago under circumstances which created no suspicion of a will the provisions of which have been accepted by all the parties as reasonable and proper and such as the testator would be likely to make.

The appeal is therefore dismissed with costs.

O. M. *Appeal dismissed.*

(1) (1910) 14 C. W. N. 1068.