APPELLATE CIVIL.

Before Fletcher and Ghose JJ.

1920

March 15.

SAROJINI DASI

v.

RAJLAKSHMI DASI.*

Letters of Administration—Probate and Administration Act (V of 1881), s. 16—General citation, issue of—Special citation to executor to accept or renounce, not issued—Will, validity of—Proper procedure.

In a proceeding under the Probate and Administration Act, general citation was issued to the executor to attend and watch the proceeding but no appearance was entered by him and letters of administration with a copy of the will annexed was granted to the applicant :—

Held, that the validity of the will was established, but letters of administration should not have been granted, without calling upon the executor by a special citation under section 16 of the Act to accept or renounce his executorship.

APPEAL by Sarojini Dasi, minor, by her husband and next friend Radhanath Shaha, and another (objectors).

One Rebati Mohan Shaha left his property by a will to his brother Ramani Mohan Shaha and appointed one Beni Madhab Shaha as executor. On the death of Rebati Mohan Shaha, Ramani took possession of the property, and obtained probate of the will ; it was however revoked on Ramani's death at the instance of Sarojini Dasi, daughter of the testator. The widow of Ramani, Rajlakshmi Dasi, then applied for letters of administration, alleging that the executor had refused to act and had declined to apply for probate ; the application was opposed by Sarojini, the daughter, and Radharani, the mother, of the testator ; the only

* Appeal from Original Decree, No. 275 of 1918, against the decree of C. Bartley, Additional District Judge of Dacca, dated July 29, 1918.

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issue framed was, "Was the will duly executed by the testator?" At the time of argument, however, a further point was raised by the objectors, viz., that as the provisions of section 16 of the Probate and Administration Act (V of 1881) had not been observed, letters of administration could not be issued.

The learned Judge found that the will was genuine and duly executed, but refused to consider the other objection on the ground that no specific issue on that question had been raised. From this decision the present appeal to the High Court was preferred.

Dr Sarat Chandra Basak and *Babu Nabadwip Chandra Saha*, for the appellants. Citation under section 16 of the Probate and Administration Act is necessary before a grant can be legally made, the learned Judge is in error in not considering the point; it is a question affecting the jurisdiction of the Court and the case should be sent back to be retried after issuing citation calling upon the executor either to accept or to renounce. The following cases were referred to: *Hormusji Navroji* v. *Bai Dhanbaiji*, *Jamsetji Dosabhai* (1), *Digambar Keshav Shrotri* v. *Narayan Vithal Ashtekari* (2).

Babu Upendra Lal Roy and *Babu Jitendra Coomar Sen Gupta*, for the respondent. There was a general citation issued on the executor, though no special citation under section 16 of the Act was served on him; the executor was thus aware of the proceeding and had ample opportunity to accept or renounce; as he did not appear and apply for probate, it must be assumed that he had renounced the executorship; citation under section 16 need not be issued until the will is proved; it cannot therefore be said that because no citation under section 16 was issued, the whole

(1) (1887) I. L. R 12 Bom. 164. (2) (1910) 13 Bom. L. R. 38.

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proceeding was void: *Dwijendra Nath Sarma Purkayastha* v. *Goloke Nath Sarma Purkayastha* (1) Mortimer's Probate Law and Practice, p. 575.

FLETCHER J. This is an appeal preferred by the objectors against the judgment of the learned Additional District Judge of Dacca dated the 19th July, 1918, directing letters of administration with a copy of the will annexed of one Rebati Mohan Saha Biswas to issue to the petitioner. Dr. Basak, who appears for the appellants, with his customary fairness admits that, having regard to the opinion of the learned Judge expressed in his judgment with reference to the oral evidence, it would not be possible for him to challenge the findings arrived at by the Court below That is obviously so. The Judge had the opportunity of seeing the witnesses and examining their demeanour and, on a consideration of the facts, he arrived at a definite conclusion as to the credibility of the witnesses. That finding cannot be displaced. But the point that has been raised in support of the appeal is this: there was an executor named in the will. The general citation went to the executor to be made a party to the proceedings. He did not appear. But still he was a party to the proceedings and the will has been established. Now, the executor would strictly, in the first place, be the person to obtain probate of the will under the law. In this case, letters of administration with a copy of the will annexed have been directed to issue to the respondent. The question that we have got to consider is—"Is the course adopted a right one?" Now, section 16 of the Probate and Administration Act provides that letters of administration in a case like this shall not be granted to any other person

(1) (1914) 19 C. W. N. 747.

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until a citation has been issued calling upon the executor to accept or renounce his executorship. Section 17 provides the manner in which the renunciation of the executorship is to be made. Section 18 provides that, if the executor renounce or fail to accept the executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy. It is not denied in this case that up to the present no special citation such as is mentioned in section 16 of the Probate and Administration Act has been issued. The citation issued on the executor was the ordinary citation to attend and watch the proceedings. The will has been established in his presence, but the citation under section 16 has not issued. Now, what is to be done in a case like this? It is quite clear that the Judge was wrong in issuing letters of administration with a copy of the will annexed because he acted with clear disregard to the provisions of section 16 of the Probate and Administration Act. The point evidently was raised before the learned Judge, because it appears in his judgment and the remark that the learned Judge made thereon, was that he declined to consider the point in the case. We have to consider it and it seems to me that we ought to set aside the grant of letters of administration with the will annexed. What ought now to be done is this: the executor was a party to the proceedings establishing the will. The will was clearly established in the presence of the parties, and, amongst others, the executor was served with a general citation to attend and watch the proceedings as a party to the suit, so the validity of the will is established. It is quite clear that, unless and until

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the validity of the will was established, the executor was not bound to accept or renounce his executorship. He could not be compelled to say whether he would accept or renounce the executorship until the will was established. But once the will was established, the executor is now bound to accept or renounce his executorship. The proper order would be to set aside so much of the order of the Court below as directs the issue of letters of administration in respect of the estate of the deceased with a copy of the will annexed and in lieu thereof direct that Court to issue a special citation to the executor named in the will as mentioned in section 16 of the Probate and Administration Act and, in the event of the executor renouncing or failing to accept the executorship within the time limited for the acceptance or refusal thereof, to issue letters of administration with a copy of the will annexed to the present respondent, Rajlakshmi Dasi.

The only other question that we have got to deal with in this case is the question of costs. It is quite clear that the appellants were compelled to come here They have got an interest in seeing that the executorship is entrusted to the person the testator selected. Moreover, the point raised in the appeal was raised before the learned Judge of the Court below and pressed on him; but the learned Judge said that he declined to consider it. Therefore, the appellants were compelled to prefer this appeal. In these circumstances, I am of opinion that both parties are entitled to recover their costs in this appeal out of the estate of the deceased. As regards the costs of the Court below, we see no reason to disturb the order made by the learned District Judge.

GHOSE J. I agree.

A.S M. A. *Case remanded.*