1925

NISHI KANTA CHAUDHURY v. GOPESWAR CHATTERJEE.

the election was void as the defendant No. 1 was not qualified to stand as a candidate and a declaration that the plaintiff was entitled to participate in the election after the exclusion of the defendant No. 1 as his rival candidate. The decree passed by the Munsif which has been upheld by the Subordinate Judge should accordingly be altered in the manner indicated above.

The appeal succeeds to the extent indicated above but in the circumstances of the case each party should bear his own costs in this Court.

A. S. M. A. *Appeal allowed in part.*

APPELLATE CIVIL.

Before Walmsley and Chakravarti JJ.

SURJYA KUMAR DEB CHAUDHURY

v.

JAYNARAYAN DEB.*

1926

Jan. 4.

Probate—Dismissal of application for probate for default and without trial, propriety of—Duty of Court in applications for probate—Civil Procedure Code (Act V of 1908), O. IX r. 9.

If a will is propounded by the executors appointed by it, the Court must decide as to the genuineness or otherwise of that will, if there is any objection raised as regards its validity.

The dismissal of an application for probate without trial of that question is not a decision binding for all purposes.

Ramani Debi v. *Kumud Bandhu Mookerjee* (1) relied on.

APPEAL by Surjya Kumar Deb Chaudhury, the petitioner for probate.

* Appeal from Original Decree, No. 132 of 1924, against the decree of B. N. Rau, District Judge of Sylhet, dated Jan. 24, 1924.

(1) (1910) 14 C. W. N. 924.

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SURJYA KUMAR DEB CHAUDHURY v. JAYNARAYAN DEB.

One Hara Gopal Dutta executed a will on the 6th Agrahayan, 1315 B.S., corresponding to 21st November, 1908. By the will he appointed his son, Jogesh Chandra Dutta, and one Surjya Kumar Deb Chaudhury, executors. After his death, the executors applied for probate of the will, on the 11th July, 1910. The application was dismissed for default. On the 14th July, 1911, Jogesh Chandra Dutta alone applied for probate. The then District Judge held that, as the previous application had been dismissed for default, he could not hear the second application, and he accordingly dismissed it. After the lapse of some 12 years, Surjya Kumar Deb Chaudhury filed the present application for probate. The District Judge dismissed this application also, saying that the reasoning on which Jogesh Chandra Dutta's second application was dismissed by the District Judge in 1911 would seem to apply to the present petition as well. He further held that Surjya Kumar Deb Chaudhury, not having taken any steps to have his application restored after it had been dismissed for default, was debarred by O. IX, r. 9, C. P. C., from making a fresh application now.

This appeal was preferred against the last order.

Babu Birendra Kumar De, for the appellant, urged that O. IX, r. 9 had no application: *Ramani Debi* v. *Kumud Bandhu Mookerjee* (1).

Mr. Rishindra Nath Sarkar (with him *Babu Kali Sankar Sarkar*), for the respondent, contended in the first place that as the second application was contested and decided in the presence of the parties, the present application was barred on the principle of *res judicata*. In the second place, the present application was not maintainable as the testator had

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appointed two executors, but the present application was made by one of them only.

CHAKRAVARTI J. This is an appeal by the applicant for probate of a will said to have been executed by Hara Gopal Dutta on the 21st November, 1908. The petitioner is one of the two executors appointed by the will. The application for probate was opposed by the purchasers from his son of some of the properties left by the testator and the learned District Judge of Sylhet has dismissed the application without going into the merits of the case. It appears that a previous application for probate of this will was made by both the executors, Surjya Kumar, the present applicant and one Jogesh Chandra Dutta in the year 1910 and that application was dismissed for default before the summons was served. Then, in the year 1911, another application for probate of the same will was made by the executor Jogesh Chandra Dutta. The learned District Judge dismissed that application too without going into the merits of the case on the ground that a previous application for the same had already been dismissed in 1910.

In the present appeal, the learned vakil for the petitioner appellant contends that the order of the learned District Judge dismissing the application without going into the merits of the case is wrong. I think that this contention is well founded. It was pointed out by this Court in the case of *Ramani Debi* v. *Kumud Bandhu Mookerjee* (1) that the provisions of section 103 of the Code of 1882 were not applicable to proceedings like this. Both the orders passed, one in 1910 and the other in 1911, were passed without, as already stated, going into the merits. Therefore, it cannot be contended that those orders are *res judicata*

(1) (1910) 14 C. W. N. 924.

as is pointed out in the case referred to above, nor can it be said that the proceedings are barred by the provisions of Order IX, rule 9 of the present Code of Civil Procedure, which corresponds to section 103 of the old Code of 1882 under which the case just cited was decided. It seems to me just and proper that, if a will is propounded by the executors appointed by it, the Court must decide as to the genuineness or otherwise of that will, if there is any objection raised as regards its validity. The dismissal of an application for probate without trial of that question cannot be said to be a decision binding for all purposes. If an executor is denied the opportunity of putting his case before the Court in circumstances existing as in the present case, the result is that the will of the testator is given a go by and it becomes altogether an infructuous document. I think, therefore, that the judgment of the learned District Judge in the present case should be set aside and the case sent back to the primary Court for retrial on the merits. The learned District Judge should decide the other objection raised by the objectors and then dispose of the case according to law. Each party will bear his own costs up to this stage. Costs of the further proceedings will abide the result of the decision on the fresh trial.

WALMSLEY J. I agree.

Judgment set aside. Case remanded.

S. M.