## APPEAL FROM ORIGINAL CIVIL.

*Before Rankin C. J. and C. C. Ghose J.*

PASHUPATI MUKHERJI

*v.*

SHITALKUMAR SARKAR.*

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*July* 30, 31.

*Probate—Compromise to withdraw caveat—Re-hearing before order is completed.*

In a probate suit, a petition of compromise was put in, withdrawing the caveat, and, on formal proof of the will, probate was granted. Subsequently, before the order was completed, the caveator made an application for revocation of that grant and re-hearing of the case. The learned Judge in the original court ordered a re-hearing.

*Held*, on appeal, the learned Judge could do so before the order was completed and a compromise in a probate matter did not tie the hands of the court nor that of the caveator in placing fresh facts before the court.

APPEAL from an order of Buckland J.

This was an application by Shitalkumar Sarkar for revocation of a probate granted in the goods of Rajabala Dasee, deceased. The applicant was a brother to the testatrix and had entered a caveat. When the probate suit came on for hearing—on the second day of hearing—terms of compromise were put in, whereby the applicant was to withdraw his caveat on getting Rs. 20,000. In the meantime, Shital had mortgaged his interest in the woman's estate to one Kanailal Pal, and the mortgagee was also made a party to the compromise. Thereafter, formal proof of the will was given and probate was ordered to issue. Before completion of the said order, on the 5th March, 1930, this application was made for revocation of the grant on the ground that the terms of the compromise were not explained to the applicant, he never consented to the compromise and the terms were signed by him on the belief that it was some other paper necessary for further proceeding of his case and various other allegations against his

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attorney. The learned Judge, after hearing the application, ordered that the decree directing the grant be vacated and that the suit be restored for trial on its merits and the propounder do pay the costs.

From that order, this appeal was filed.

[All dates and full details of facts and arguments appear from the judgment.]

*N. N. Sircar*, *Advocate-General*, and *N. C. Chatterjee* for the appellant.

*A. K. Roy* and *P. C. Ghose* for the respondent.

RANKIN C. J. In this case, a woman of the name of Rajabala Dasee died on the 1st of June, 1928. It is alleged that, on the 31st of May of the same year, she made a will. By the terms of that document, the present appellant before us—Pashupati Mukherji was made the executor. He does not appear to be a relation of the deceased. The will itself gives certain pecuniary legacies by the second clause and thereafter it says that the executor and one Jeeban would be entitled to the residue of the estate. So that it is a very simple will—neither Pashupati nor Jeeban being a relation of the testatrix. It appears that one Shitalkumar Sarkar—the present respondent before us is a relation of the woman, namely, her brother and that, except for a pecuniary legacy of Rs. 500, he is excluded from participation in the woman's estate if the will is a valid will. On the 7th of June, 1929, Shital applied before the Court at Alipur for letters of administration of the estate and effects of the deceased Rajabala on the footing of intestacy and this application was on the 24th of that month dismissed for want of jurisdiction. On the 10th of June of the same year, Pashupati, the executor, applied in the High Court for probate of this will. The matter was coming on for hearing on the 12th of February, 1930, and did, in fact, come on in the afternoon and the learned counsel for the propounder had, in part, opened his case. It appears from the evidence that, on that evening, there was a meeting

at the house of the leading counsel for Shital, who had filed a caveat against the executor's application for probate and was defending the probate suit. It is said that at that meeting there was a discussion as to the terms of a settlement between the caveator and his attorney and counsel. On the next day, the 13th of February, certain negotiations took place between the leading counsel on either side according to which it was ultimately settled between the counsel that Shital should get Rs. 20,000 and, on receipt of that amount, should withdraw his caveat. It appears that Shital had in the meantime executed a mortgage in favour of one Kanailal Pal of his interest in the woman's estate and it was necessary in order that the compromise should be secured that this mortgagee should be made a party to the petition of compromise. The terms of the compromise were typed out and they were signed by the leading counsel for the caveator defendant and they were signed by Shital himself on the counsel's table before the learned Judge, when the matter was mentioned to him on that day, the 13th. The learned Judge, thereupon, treating the case as one in which all contentions had been withdrawn, heard the evidence of one doctor witness to the execution of the will and made a formal order that the terms of the agreement be recorded. Jeeban and Kanailal Pal were not in Court at the time and had not signed the document. So, he gave liberty to those two gentlemen to sign. He discharged the administrator *pendente lite*, found the will proved, directed probate to issue and directed the administrator to make over the assets to the executor at once. It appears further that there is evidence that the caveator defendant met his leading counsel later on in the day with the mortgagee Kanai at a time when Kanai signed the document. All the four parties signed the document in the course of the day. Thereafter, on the 27th of February, 1930, Shital through certain attorneys wrote to his attorney, Shailendranath Basu, saying that he wanted a change of attorney and that he was going to apply for a revocation of the grant.

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He did apply on the 5th March, 1930, and, on the 13th March, 1930, he gave notice of an application to set aside the decree of the 13th February. At that time, it appears that the decree had not been brought into existence, that is to say, there was a draft decree, but that the decree had not been completed. I understand that it was not signed by the learned Judge and was not filed. In effect, the decree had not been perfected. Thereafter, it appears that, on a representation being made to the learned Judge, he was of opinion that it was only proper that the matter should be dealt with on oral evidence and the matter came before the learned Judge in this form: First of all, there was a petition by the caveator Shital, in which he made various allegations. These allegations were to the effect that he had found certain conduct on the part of the executor which was suspicious and which raised suspicion as to whether his attorney Babu Shailendranath Basu had been playing him fair. He says that he never took any part in any negotiation for settlement at his counsel's house on the evening of the 12th, that he never took any part in any negotiation on the morning of the 13th and that when he came to Court on the 13th he was asked if his witnesses were there and, on telling his attorney that his witnesses were there, he was asked to put his name on a document which he now finds contains the terms of settlement. He says that he signed that document thinking that it was some paper which was necessary to further contest the case, that the paper was never read over or explained to him by anybody and that he did not know until he found that the suit was not being further contested that he was supposed to have settled the suit or that the paper was a paper containing the terms of settlement. He further says that he objected to the settlement from the beginning and that his attorney was acting collusively with the executor in the matter.

Now, at the hearing of this application before the learned Judge, an entirely different case was made. In fact, it is abundantly evident to me that Shital is a

person on whose oath no court of law would be justified in placing any reliance at all. Not only has Shital made statements that are untrue, but he takes no care whatever to preserve any consistency in the various untruths he tells. He says in his evidence that the attorney said nothing to him about the paper being required for contesting the case. He says that the attorney never told him anything about the paper. He assumed that such a paper was required for the purpose of contesting the suit. He says that there never was any conversation between him and his attorney in respect of that paper, that his leading counsel, Mr. S. C. Bose, gave false evidence when he said that he (the caveator) was at Mr. Bose's house on the evening of the 12th and that it is false that he was at Mr. Bose's house on the morning of the 13th. Now, Mr. S. C. Bose, his leading counsel, says that, on the 12th, his client was not only met in the corridor outside the Court-room but also in his house the same evening and that the client was present throughout the conversation as regards the desirability of a settlement. He says also that his client and the attorney were at his house on the morning of the 13th, when he came back after certain negotiations with the learned counsel on the other side. He further says that, at about midday of the 13th, the client and the mortgagee came to him and the mortgagee's signature to the agreement was taken. Mr. Hazra, the junior counsel for the caveator, says that he did not read out or explain the document to the client on the morning of the 13th, but that he told him that he (Shital) was going to withdraw his caveat for Rs. 20,000. He says that the client was at Mr. Bose's house on the morning of the 13th, that they had a consultation on the evening of the 12th, that his client was told all about it, that the client was asked by him about the value of the estate and was told by him that he was really getting an equivalent of one-third of the estate under the proposed compromise.

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In these circumstances, the learned Judge has given his decision. On the merits, as regards the terms of the settlement, the learned Judge takes this view that he is not satisfied that the caveator had explained to him the nature of the bargain. He says "there might have been a talk of settlement, but there "is nothing to show that the caveator knew what the "terms of settlement would be and that he understood "them or that they were explained to him." The learned Judge has commented upon the fact that the attorney was not called and, finding that it is not clear that either of the counsel or the attorney had explained the terms of the settlement carefully to the caveator, he is not prepared to hold that the caveator knew what he was signing. The learned Judge says that the caveator may have had some idea on the subject, but he thinks that it by no means follows that the caveator realized that the contest then and there should come to an end, and that, having regard to the fact that the agreement was in English which was not the language of the caveator which might require interpretation, he is not prepared to hold that the caveator is bound by it. He makes certain comments also upon various matters which were not really enquired into, but matters which are alleged in the opening paragraphs of the petition of the caveator as circumstances throwing great suspicion upon the *bona fides* of the attorney.

In these circumstances, an order has been drawn up stating that "it is ordered that the decree passed "on the 13th February directing grant of probate "* * * be and the same is hereby "vacated and this suit be restored on the general list "of suits for trial on its merits and it is further "ordered that Pashupati Mukherji"—the proponent —"do pay to the caveator his costs of and incidental "to these proceedings" before the learned Judge as of a trial. From this order, the present appeal has been taken before us.

Now, the first question which has to be noticed is that there was no decree at the time the learned Judge

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was hearing the application with which we are now concerned; and, in these circumstances, we have to consider whether it was not a matter which was within the power of the learned Judge, if any circumstances of suspicion came to his notice formally or informally, to say that he was not prepared further to proceed upon the view that he was satisfied by the evidence given at the original hearing that this will was the last will of the testatrix. It appears to me that the position before a decree is drawn up and perfected and the position thereafter are very different and it is quite clear that when a court is dealing with the question of proof of a will, it is entitled to insist upon sufficient proof to satisfy itself. In this case, for example, the various pecuniary legacies entirely depend upon the validity of the will, and, if, on hearing the evidence of one witness, the Court is satisfied about the will, and afterwards before the decree is drawn up, the Court, for any reason, thinks that that evidence is not sufficient and changes its mind as to the sufficiency of the proof, it cannot, I think, be doubted that it is open to the Court to say that nothing has been so far done which binds its hands in any way and that the matter should be reheard and further evidence received upon the question. It is not a case of the same character (as has been very rightly conceded) as cases of orders which depend upon consent of parties in matters where the parties are entirely their own masters. The case of *Harvey* v. *Croydon Union Rural Sanitary Authority* (1), which has been referred to, is not really a case of the same character as the present. If a person makes a bargain, no doubt, even before a decree has been passed thereupon, he must give good reasons for asking the Court to permit him to resile from his bargain. Here, so far as proof of the will is concerned, the matter is not a question of bargain and the Court is not bound by any agreement. It does seem to me impossible to say that Mr. Justice Buckland was not entitled upon mere circumstances of suspicion to say that he would not further proceed

(1) (1883) 26 Ch. D. 249.

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upon the facts placed at the original hearing, but would insist upon the case being set down and having a fuller investigation of the circumstances.

Then it is said that the learned Judge has wrongly found that Shital did not know the nature of the terms of the settlement and it is pointed out that he must have known that he was signing a document which contained terms of settlement because it is manifest that he is speaking falsely when he says that he had no idea that the document which he was signing was a settlement of the case. In that respect, I am bound to say that the learned Judge's judgment is not quite in accordance with the evidence. It is very difficult indeed to suppose on the evidence in this case that, when Shital signed that document, he did not know that he was signing some sort of compromise in the case. It is quite true that the ordinary law is that knowledge of the general character of the document which he was signing would be sufficient to make the document binding against him and in favour of the party contracting with him. There, again, for the present purpose, one has to remember two things. First of all, the learned Judge's hands were not bound, so far as regards issuing probate of the will, by anybody's consent and, secondly, even if they were, the case was a case in which a party was asking the assistance of the Court within the meaning of that expression as used by Lord Halsbury in *Neale* v. *Gordon Lennox* (1); and it would be in no way conclusive to say, as a matter of ordinary law of contract, that the proponent would be entitled to assume that the bargain represented by the document which Shital had signed was a bargain to which he assented. That being so, it does not seem to me that it is possible for us in this case to hold that the learned Judge was wrong in saying that he was not satisfied with the previous evidence or that the previous evidence without further investigation should not be acted on before probate is issued of this will.

The next question which arises is this: Learned counsel for the proponent says that a bargain has

(1) [1902] A. C. 465.

been made and it is a bargain between four persons—Jeeban and the mortgagee as well as the propounder and the caveator, and that, if this probate case is investigated *de novo*, then whether the *will* is found proved or held not to be proved, difficulties will arise as to whether Kanai, the mortgagee, has any interest under the terms of the settlement. Accordingly, he says that, if this case is to be re-tried, it ought to be laid down by us that the caveator should not be allowed to insist upon his caveat or to resist the grant of probate of the will and that that should be laid down, first of all, because that was the man's bargain and, secondly, because, in view of the obligation incurred by the propounder to the mortgagee, the caveator should be held to be stopped from resisting the grant of probate of the will. In my opinion, there is no validity in these suggestions.

So far as regards the proof of the will, the case must go back before the learned Judge and it is quite clear to me that it would be wrong to lay down that the caveator because of his previous bargain or conduct should be prevented from laying any facts before the Court upon the new enquiry.

The circumstance which then requires to be considered is this: The learned Judge having proceeded to some extent upon matters of suspicion which he collected from that part of the caveator's petition which was not dealt with by the oral evidence, made an order against the propounder that costs of the caveator before him should be paid by the proponent. I cannot see how this order can be justified at all. It is quite clear that in this matter the proponent has done nothing whatever to entitle the Court to visit him with costs. The whole difficulty and trouble has arisen, first of all, by the foolish conduct of the caveator himself upon his own story, secondly upon his own story by the conduct of his attorney and counsel and thirdly, I should add for myself, because of the high degree of untruthfulness of the caveator himself. In these circumstances, having made a bargain, he has come before the Court

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to show reasons why he should not be held to that bargain. Having regard to the fact that the proof of the woman's will is not a matter merely of personal interest of Pashupati on the one hand and Shital on the other, the learned Judge has not thought fit to hold him to his bargain to withdraw his caveat and withdraw all his opposition. Why, in the world, the executor should pay his costs in respect of this application, I am at a loss to understand. I am very clearly indeed of opinion that the proper order as regards costs before the learned Judge should be that Shital should pay the whole of the propounder's costs before the learned Judge and, as this appeal must be allowed on that question, I am also of opinion that Shital must pay the propounder's costs of this appeal.

It has been insisted upon by the learned Advocate-General, on the part of the propounder, that a bargain such as the present is in no way contrary to public policy and I entirely agree that a promise to withdraw a caveat and to get certain money from the executor, if the will is proved, is a bargain which, if fairly made, is in no way contrary to public policy. It is a very different thing, however, to say that such a bargain as that will be enforced in the sense that the court in a probate suit will see that it is specifically performed by not allowing the caveator in spite of his previous promise to contest the question whether the will is the will of the testatrix or not. I am clearly of opinion that, though a breach of that promise may sound in damages, it will be entirely wrong for us to lay down in a probate case that a man's previous promise will stop him before decree from laying any fact before the court with reference to the question whether a certain document was really executed as will by the testatrix or not. I know of no authority which shows that in a case of this kind you could insist because of the bargain on having a caveat discharged so as to prevent a person who desires to show that the testator never executed such a document from bringing such facts to notice at the time when the court is considering the grant of probate of the will.

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The appeal, therefore, must be allowed, but only as regards the question of costs. The costs before the learned Judge will be on the same scale as allowed by him, that is, on scale No. II.

GHOSE J. I agree.

*Appeal allowed.*

Attorneys for appellant: *Morgan & Co.*

Attorneys for respondent: *Pal & Ray.*

N. G.