ORIGINAL CIVIL.

Before Panckridge J.

1939

July 19, 20, 21; *Aug.* 1.

PANNA LAL

v.

HANSRAJ GUPTA.*

Jurisdiction—*Revocation of probate—Civil suit—Letters Patent, 1865, cl. 12—Code of Civil Procedure (Act V of 1908), s. 9—Indian Succession Act (XXXIX of 1925), s. 263.*

The High Court in its Ordinary Original Civil Jurisdiction cannot entertain a suit for revocation of a grant of probate made in its Testamentary Jurisdiction on the ground that the will is not a genuine will.

Case-law reviewed.

Semble. No civil suit lies to revoke a probate on any ground; the exclusive remedy in every case is an application under s. 263 of the Indian Succession Act.

ORIGINAL SUIT.

The facts of the case are fully stated in the judgment.

S. N. Banerjee and *K. Basu* for the legatees. This suit does not lie in the Original Side. The Testamentary Jurisdiction of this Court is an exclusive jurisdiction and a probate can only be revoked by the Testamentary Court. The fact that cls. 11 to 18 inclusive give Original Civil Jurisdiction to this Court and subsequent clauses enumerate various other matters of jurisdiction, such as Criminal, Admiralty and Vice-Admiralty, Matrimonial and Testamentary, indicates clearly that exclusive jurisdiction is given in different types of cases. In *Mayho* v. *Williams* (1) and *Komollochun Dutt* v. *Nilruttun Mundle* (2) it was held that a grant of probate cannot be impugned in a suit on the Original Side of the Court.

*Original Suit No. 1458 of 1937.

(1) (1870) 2 N. W. P. H. C. R. 268, 273-4. (2) (1878) I. L.R. 4 Cal. 360, 362.

Such a matter must clearly be contested before the Court sitting as a Court of Probate, and, for such purpose, the proper procedure has been laid down by the Indian Succession Act (*vide* s. 217 and Part IX of the Act). In the goods of *Mohendra Narain Roy* (1). Where an Indian enactment has made a clear provision, it is not necessary to consider English cases on the subject. *Kurrutulain Bahadur* v. *Nuzbat-ud-Dowla Abbas Hossein Khan* (2); *Ramanandi Kuer* v. *Kalawati Kuer* (3). The only remedy in a case like this is by an application under s. 263 of the Indian Succession Act. The express provision of this section, by implication, excludes any other remedy. *Bhaishankar Nanabhai* v. *Municipal Corporation of Bombay* (4).

K. P. Khaitan and *A. M. Bosu* for the executor defendants supported Banerjee.

Sudhir Ray and *N. Sanyal* for the plaintiffs. The High Court in its Ordinary Original Civil Jurisdiction is competent to set aside a grant of probate made by it in the Testamentary Jurisdiction. *Komollochun Dutt* v. *Nilruttun Mundle* (5); *Nobeen Chunder Sil* v. *Bhobosoonduri Dabee* (6); In the goods of *Harendra Krishna Mukerjee* (7).

In *Mayho* v. *Williams* (8) the question whether a suit would lie on the ground of fraud was not considered.

Clearly "suits of every description" may be tried in the Original Side of the High Court. And that testamentary matters are included is indicated by the application of cl. 12 of the Charter in determining jurisdiction to try Originating Summons in such matters. *Provas Chandra Sinha* v. *Ashutosh Mukherji* (9).

(1) (1900) 5 C. W. N. 377.
(2) (1905) I. L. R. 33 Cal. 116; L. R. 32 I. A. 244.
(3) (1927) I. L. R. 7 Pat. 221; L. R. 55 I. A. 18.
(4) (1907) I. L. R. 31 Bom. 604.
(5) (1878) I. L. R. 4 Cal. 360, 362-3.
(6) (1880) I. L. R. 6 Cal. 460,
(7) (1900) 5 C. W. N. 383, 385.
(8) (1870) 2 N W. P. H. C. R. 268, 273-4.
(9) (1929) I. L. R. 56 Cal. 979, 985.

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Unlike in England, where the three divisions of the High Court have exclusive jurisdiction, the Letters Patent, 1865, does not set up such separate exclusive jurisdictions. The High Court has jurisdiction to try all kinds of suits and the various clauses merely enumerate them. Clause 12 is clearly in general terms; contested probate proceedings are suits within the meaning of cl. 13 and a judgment or order in probate proceedings comes within the purview of cl. 15. The ordinary jurisdiction really embraces all matters which can be dealt with in the ordinary course of law and includes testamentary, insolvency and other jurisdictions. *Vide* Mulla's Code of Civil Procedure, 10th Ed., p. 1344 and *Navivahu* v. *Turner* (1); see also *In the Matter of the* Ship *"Champion"* (2); *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar* (3); *Annoda Prasad Banerjee* v. *Nobo Kishore Roy* (4); *Samuel* v. *Samuel* (5); *Benjamin* v. *Benjamin* (6); *Jalbhai Cursetji* v. *Jerbai Harmusji* (7); *Pran Kumar Pal Chaudhury* v. *Darpahari Pal Chaudhury* (8).

This is really a suit to set aside a judgment obtained by fraud and a suit is necessary for the purpose. *Venkatasiva Rao* v. *Venkatanarasimha Satyanarayanamurty* (9); *Flower* v. *Lloyd* (10); *Lakshmi Charan Saha* v. *Nur Ali* (11); *Suresh Chandra Sen* v. *Jogesh Chandra Sen* (12).

Such a suit may be brought in the Court within whose jurisdiction the fraud was perpetrated. *Puran Sautra* v. *Shaikh Tajooddeen* (13); *Abdul Huq Chowdhry* v. *Abdul Hafez* (14).

(1) (1889) I. L. R. 13 Bom. 520; L. R. 16 I. A. 156.
(2) (1889) I. L. R. 17 Cal. 66.
(3) (1901) I. L. R. 25 Mad. 406.
(4) (1905) I. L. R. 33 Cal. 560.
(5) (1929) I. L. R. 57 Cal. 1089.
(6) (1925) I. L. R. 50 Bom. 369, 378 *et seq.*
(7) (1930) I. L. R. 55 Bom. 145.
(8) (1926) I. L. R. 54 Cal. 126, 129.
(9) (1932) I. L. R. 56 Mad. 212, 216-17.
(10) (1877) 6 Ch. D. 297, 301.
(11) (1911) I. L. R. 38 Cal. 936.
(12) (1939) 43 C. W. N. 969.
(13) (1866) 5 W. R. (Act X) 20.
(14) (1910) 14 C. W. N. 695.

In England, an action would lie for revocation of probate (*vide* Mortimer on "The Law and Practice of the Probate Division", 2nd Ed., pp. 550-552). In *Priestman* v. *Thomas* (1), a compromise decree establishing a will was set aside on the ground that such will was a forgery.

In India, s. 44 of the Indian Evidence Act shows that the plaintiff in a suit is entitled to show that a probate was obtained by fraud or collusion, for s. 41 includes probate proceedings. *Rakshab Mondal* v. *Tarangini Devi* (2); *Harris* v. *Spencer* (3).

This matter can, therefore, be agitated by a suit in the Original Side. This view is supported by the terms of cl. 12 of the Letters Patent and s. 9 of the Code of Civil Procedure.

If the probate of the second will is set aside it will operate not only against the parties to those probate proceedings but against the whole world. *Birch* v. *Birch* (4); *Bireswar Ghose* v. *Panchkouri Ghose* (5).

An application under s. 263 is not the exclusive remedy in cases where probate has been obtained by fraud. The Indian Succession Act does not set up a Court of Probate or make it a Court of exclusive jurisdiction. Section 247 of that Act contemplates suits touching the validity of a will as distinguished from probate proceedings.

Banerjee in reply.

Cur. adv. vult.

PANCKRIDGE J. This suit has been set down for the trial of certain issues settled by McNair J. on

(1) (1884) 9 P. D. 210.
(2) (1920) 25 C. W. N. 207.
(3) [1933] A. I. R. (Bom.) 370.
(4) [1902] P. 130, 137-8.
(5) (1922) 27 C. W. N. 587, 600-01.

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December 5, 1938. The facts can be summarised as follows :—

One Lala Raghu Mull Khandelwal, a resident of Delhi, to whom I shall refer as "the testator", died without male issue on September 5, 1926. More than twelve years prior to his death, on April 6, 1914, he had executed a will, whereby he appointed his friend, Rai Sahib Kedar Nath, and his nephew, Deen Doyal, his executors. As to the residue of his estate, moveable and immoveable, he directed that if he died without male issue it should be applied by his executors for the purpose of education of boys and girls belonging to the Hindu community, the Arya Samaj having preference, in such manner and under conditions as to his executors shall seem proper.

The will was deposited for safe custody with the firm of Messrs. B. N. Basu & Co., the well-known attorneys.

On the day before his death, that is to say, on September 4, 1926, the testator executed another will. He appointed as his executors his son-in-law Hansraj, his two nephews, Dinanath and Gordhan Das, and one Gopal Das Modi. He gave power to his wife Bhagwati Debi to appoint herself or another person as fifth executor, and she subsequently exercised this power by appointing herself executrix.

By this will the testator purported to revoke all wills and testamentary dispositions theretofore made by him.

The second will does not contain a bequest for the purpose of the education of Hindu boys and girls, such as is found in the first will.

On September 23, 1926, the executors and executrix of the second will applied for probate to this Court in its testamentary and intestate jurisdiction.

Caveats were entered by various members of the testator's family, and also by Kedar Nath, the executor of the first will.

All these caveats were subsequently withdrawn, and probate of the second will was granted on January 10, 1927.

The executors subsequently fell out among themselves, and in July, 1929, the executor Gopal Das filed an administration suit. The Official Receiver was appointed receiver of the testator's estate on June 16, 1931.

On May 11, 1937, the plaintiffs obtained leave under O. I., r. 8(*1*) of the Code of Civil Procedure, as members of the Hindu community, to sue on behalf of all persons including boys and girls belonging to the community, and also to make the Official Receiver a defendant. On May 16, 1937, this suit was instituted.

The only other fact that requires mention is that on May 18, 1937, McNair J. dismissed an application made in the testamentary jurisdiction under s. 263 of the Succession Act for revocation of the grant of probate of the second will. The application was made by Rai Bahadur Panna Lal and Pandit Shiva Narayan Kaul, two of the plaintiffs in the suit, notice of motion having been given on August 25, 1936.

The defendants in this suit are the five executors of the second will, the testator's daughter, who is the wife of the first defendant, four persons to whom certain specific properties are thereby bequeathed in trust for charitable and religious purposes, and the Official Receiver.

Paragraphs 7 to 25 set out a long story to the effect that the execution of the second will was obtained by the defendants, other than the Official Receiver, at a

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time when the testator lacked testamentary capacity, and that subsequently the caveators were induced to withdraw their opposition to the grant of probate by corrupt means.

The plaintiffs ask for a declaration that the second will is a forgery, and that the grant of probate was obtained fraudulently and by collusion. They also ask that the probate be revoked and annulled.

There is a prayer for a declaration that the first will is the last will and testament of the testator.

There are also prayers for accounts against all the defendants except the Official Receiver, and for administration of the estate under the directions of the Court in accordance with the provisions of the first will.

Of the issues as settled by McNair J. the following have been argued, and I set them out in the order in which they were dealt with by counsel:—

(*a*) Is the Court competent to try this suit in its Ordinary Original Civil Jurisdiction?

(*b*) Are the plaintiffs competent to file the suit?

(*c*) Is the suit barred by *res judicata*?

(*d*) Is the suit maintainable without the consent in writing of the Advocate-General of Bengal?

When Mr. Ray began to address me on behalf of the plaintiffs, I observed that I did not see how I could possibly enforce any right under the first will until a grant of probate or letters of administration had been obtained in respect of it. No grant was asked for, nor, I thought, could one be asked for in a suit on the Original Side.

Mr. Ray conceded that this was so, and said that the only relief he proposed to claim was revocation of

the grant of probate. Issue (*a*) can accordingly be paraphrased thus :—

Can this Court in its Ordinary Original Civil Jurisdiction revoke a grant made by it in the exercise of its Testamentary Jurisdiction?

In the Letters Patent of 1865, cls. 11 to 18 (inclusive) are grouped under the head "Civil Jurisdiction "of the High Court".

Clause 11 defines the local limits of the Ordinary Original Civil Jurisdiction of the High Court.

Clause 12 empowers the High Court in the exercise of its Ordinary Original Civil Jurisdiction to receive, try, and determine suits of every description subject to certain conditions.

Clause 13 empowers the High Court to remove and to try and determine as a Court of Extraordinary Original Jurisdiction suits from other Courts.

Clause 14 deals with joinder of causes of action, and cl. 15 with appeals from the judgment of one Judge.

Clause 16 confers Appellate Jurisdiction on the High Court.

Clause 17 transfers the jurisdiction of the Supreme Court with respect to the persons and estates of infants, idiots and lunatics to the High Court.

Clause 18 provides that the Court for the relief of Insolvent Debtors in Calcutta shall be held before a Judge of the High Court.

Criminal Jurisdiction is dealt with by cls. 22-30 (inclusive), Admiralty and Vice-Admiralty Jurisdiction by cls. 32 and 33.

After cl. 33 there comes the heading "Testamen-"tary and Intestate Jurisdiction".

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Clause 34 confers upon the High Court the like power and authority which might be then lawfully exercised by the High Courts established under former Letters Patent in relation to the granting of probates of last wills and testaments and letters of administration.

Matrimonial Jurisdiction is conferred by cl. 35.

When we turn to the Succession Act we find that "Probate, Letters of Administration and the Administration of Assets of Deceased" are the subject matter of Part IX of the Act, and s. 217 provides that all grants of probate and letters of administration with the will annexed, and the administration of the assets of the deceased in cases of intestate succession, shall be made or carried out, as the case may be, in accordance with the provisions of Part IX.

Section 263 provides that a grant of probate or letters of administration may be revoked for just cause, and just cause shall be deemed to exist, *inter alia*, where the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case.

Mr. S. N. Banerjee contends that these provisions make the Court of Probate a Court of exclusive jurisdiction, or in other words that no civil suit will lie to revoke a grant.

The earliest relevant authority is *Mayho* v. *Williams* (1). In that case the District Judge had held that he had no jurisdiction to entertain an application to revoke the probate of a will, the execution of which was alleged to have been obtained by coercion.

In dealing with the question of jurisdiction the High Court observed :—

> So far from finding anything in the Indian Succession Act which would warrant the District Court as Court of Probate in refusing jurisdiction in such a case as the one before us, we find that by that Act jurisdiction on

(1) (1870) 2 N. W. P. H. C. R. 268, 273-4.

matters of probate is given only to the District Court and the High Court. The Judge holds that the appellant has a remedy by regular suit in the civil Court. This ruling proceeds on a misapprehension of the nature of probate and the effect of a grant of probate by a competent Court. * * * The Judge seems to have considered that a grant of probate is in the nature of a summary proceeding to be contested by a regular suit in the civil Court. This view is wholly erroneous. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction.

The earliest authority in this Court is *Komollochun Dutt* v. *Nilruttun Mundle* (1). There a suit for possession was filed in the Court of the Subordinate Judge, who held that the grant of probate of a will in virtue of which the defendant was holding was conclusive as to its genuineness.

On remand by the District Judge, the Subordinate Judge found the will to be a forgery, and the District Judge decreed the suit.

On appeal to the High Court Markby J. observed :—

We think that the District Judge was wrong in holding that the grant of probate could be impugned in this suit. The grant of probate is a decree of a Court which no other Court can set aside, except for fraud or want of jurisdiction and no such ground is alleged here.

Reference is then made to the passage in *Mayho* v. *Williams* which I have set out above. Markby J. adds :—

The proper course, if it is suggested that the probate has been wrongly granted, is to apply to the District Judge to revoke the probate, for which a special procedure is provided by the Act.

Mr. S. C. Ray maintains that this passage recognizes the right of a civil Court to entertain the present suit, inasmuch as fraud in obtaining the probate is alleged. In my opinion, the scope of this suit is not limited in this way, since the validity of the second will as a testamentary disposition is directly challenged, and the first prayer is for a declaration that it was never executed or signed by the deceased, and that it is a false and fabricated document.

(1) (1878) I. L. R. 4 Cal. 360, 362.

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In the goods of Mohendra Narain Roy (1) has been referred to. In that case Sale J. held that where it was sought to revoke a probate on the ground that the will was a forgery, the proper mode of procedure was by application under the section of the Probate and Administration Act, 1881, corresponding to s. 263 of the present Succession Act, and not by suit.

The plaintiffs have drawn my attention to *In the goods of Harendra Krishna Mukerjee* (2) where Harington J. stated that he did not agree with the contention that *Komollochun Dutt* v. *Nilruttun Mundle* (3) was an authority for the proposition that a grant of probate cannot be revoked by a regular suit instituted for that purpose. He adds, however,

> No doubt that case lays down that the grant of probate cannot be questioned in an ordinary civil suit, but it does not lay down that probate cannot be revoked by a regular suit brought in the Court by which the probate was granted under its Probate Jurisdiction.

In taking this view Harington J. was influenced by Form No. 115(2) in Sch. IV, Part E. of the Code of Civil Procedure of 1882. This form is omitted from the present Code. In any case, Harington J.'s observations cannot justify a suit to revoke a grant instituted in the Ordinary Original Civil Jurisdiction.

Reference has been made to the observations of the Judicial Committee in *Kurrutulain Bahadur* v. *Nuzbat-ud-Dowla Abbas Hossein Khan* (4) and *Ramanandi Kuer* v. *Kalawati Kuer* (5) to the effect that questions of probate law and procedure in India must be determined upon an examination of the relevant Indian enactment, uninfluenced by any consideration of the previous state of the law, or the English law upon which the enactment is founded.

(1) (1900) 5 C. W. N. 377.
(2) (1900) 5 C. W. N. 383.
(3) (1878) I. L. R. 4 Cal. 360.
(4) (1905) I. L. R. 33 Cal. 116; L. R. 32 I. A. 244.
(5) (1927) I. L. R. 7 Pat. 221; L. R. 55 I. A. 18.

Nobeen Chunder Sil v. *Bhobosoonduri Dabee* (1) has been cited. There the District Judge exercising probate jurisdiction held that neither an attaching creditor of the next of kin of a deceased person, nor a mortgagee claiming on the basis of a mortgage of the deceased's property created by the next of kin after the death of the deceased, was entitled to file a caveat against the grant of probate of an alleged will of the deceased.

The High Court on appeal held that the creditors could not challenge the will as a forgery except in a Court of Probate. White J. stated :—

> The only grounds on which the appellants could impeach the probate in a civil Court would be those stated in s. 44 of the Indian Evidence Act, namely, that the probate was granted by a Court not competent to grant it, or that it was obtained by fraud or collusion which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will—*Barnesly* v. *Powel* (2) ; but they could not show that the will was never executed by the testator, or was procured by a fraud practised on him.

If we regard the question from the point of view of principle, and apart from the authorities, we arrive at the same conclusion. The judgment of a Court of Probate is a judgment *in rem* and binds all the world. The judgment in a civil suit is operative only between the parties to it.

It is hard to see how a judgment *in rem* can be revoked or set aside by a judgment which is only conclusive *inter partes*. If we apply this test to the circumstances of the present case it is to be observed that there are legatees, who have acquired rights under the second will, who are not parties to the civil suit. A decision in favour of the plaintiffs would clearly not be binding on them.

In revocation proceedings under s. 263, the legatees would be entitled to intervene as of right. In a civil suit their right to participate in the proceedings is not absolute, but depends on the discretion of the Court exercisable under O. I, r. 10(*2*), Code of Civil Procedure.

(1) (1880) I. L. R. 6 Cal. 460. (2) (1749) 1 Ves. Sen. 284 ; 27 E. R. 1034.

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In the course of argument some confusion has been caused by the fact that the jurisdictions of the Court are subject to cross divisions. Their division according to subject matter, *i.e.*, Matrimonial, Criminal, Testamentary, *etc.*, is a division which has nothing to do with the division into Ordinary and Extraordinary, or into Original and Appellate.

It is for this reason that *Navivahu* v. *Turner* (1) which decided that the High Court in entering up judgment against an insolvent in pursuance of an order of the Insolvency Court was exercising ordinary and not extraordinary jurisdiction, within the meaning of Art. 180 of the Limitation Act of 1877, is of no assistance to the plaintiffs.

The same consideration is applicable to the argument based on fact that contentious probate proceedings before a District Judge are a "suit being or "falling within the jurisdiction of any Court" within the meaning of cl. 13, and may be removed to the High Court as a Court of Extraordinary Original Jurisdiction. *Pran Kumar Pal Chaudhury* v. *Darpahari Pal Chaudhury* (2).

In my opinion, neither cl. 12 of the Letters Patent, nor s. 9 of the Code of Civil Procedure gives the Original Side of this Court jurisdiction to entertain a suit for revocation of a grant of probate made in the testamentary jurisdiction on the ground that the will is not a genuine will.

I would indeed go further and be inclined to hold, if it were necessary, that no civil suit lies to revoke a probate on any ground, for it is my view that it was the intention of the legislature that the exclusive remedy in every case should be an application under s. 263 of the Succession Act. As an illustration of this principle I would refer to the judgment of

(1) (1889) I. L. R. 13 Bom. 520 ; L. R. 16 I. A. 156.

(2) (1926) I. L. R. 54 Cal. 126.

Jenkins C.J. in *Bhaishankar Nanabhai* v. *Municipal Corporation of Bombay* (1). Moreover the language of s. 264(1) of the Succession Act—"The District "Judge shall have jurisdiction in granting and revok- "ing probates and letters of administration in all "cases within his district"—indicates to my mind that the jurisdiction to revoke is limited to the Probate Court. I hold therefore that the issue of jurisdiction must be determined in favour of the defendants.

[The Court then dealt with the other issues.]

Attorney for plaintiff: *K. K. De.*

Attorneys for defendants: *Khaitan & Co.; I. D. Jalan; G. C. Chunder & Co.*

S. M.

Suit dismissed.

(1) (1907) I. L. R. 31 Bom. 604.